***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

JOINT APPENDIX

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19136

ANDREW R. PENCE,

*Appellant,*

v.

WALTER N. TOBRINER, *et al.*

*Appellees*

996

*Appeal From the United States District Court*
*for the District of Columbia*

# INDEX

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

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| ANDREW R. PENCE<br>5114 Lawton Drive<br>Washington 16, D.C.<br><br>Plaintiff<br><br>vs.<br><br>WALTER N. TOBRINER<br>JOHN B. DUNCAN<br>BRIGADIER GENERAL F.J. CLARKE<br>Board of District of Columbia<br>Commissioners<br><br>and<br><br>JOHN W. MACY, JR.<br>FREDERICK J. LAWTON<br>ROBERT E. HAMPTON<br>United States Civil Service<br>Commission<br><br>Defendants | ) | No. 1309-62<br><br>[*Filed April* 23, 1962] |

COMPLAINT FOR A PERMANENT INJUNCTION AND FOR A DECLARATORY JUDGMENT FIXING AND DETERMINING THE RIGHT OF PLAINTIFF AS A CIVIL SERVICE EMPLOYEE IN THE DISTRICT OF COLUMBIA GOVERNMENT AND RESTORING PLAINTIFF TO HIS RIGHTFUL GRADE AND TO SUCH OTHER RELIEF AS MAY BE PROPER

Plaintiff by his attorney brings this action against defendants named above and alleges that:

1. This is a civil action for declaratory judgment, for permanent injunctive relief and for back salary, of which this Court has jurisdic-

tion under 28 U.S.C. 1331, 1332 and 2201. The matter involves damages in excess of $3,000.00

2. At all times mentioned herein plaintiff was and is a citizen of the United States. At the time of filing this suit plaintiff maintained a residence at 5114 Lawton Drive, Washington 16, D.C.

3. At all times pertinent to this cause, plaintiff was a classified Civil Service employee with a performance rating of "satisfactory." At the time of his wrongful separation on March 10, 1958, plaintiff was serving in the position of Position Classifier, GS-12, in the Department of Public Health of the Government of the District of Columbia.

4. This cause of action arises under the Rules and Regulations of the Civil Service Commission promulgated under the authority of the Civil Service Act of 1883 (22 Stat. 403) and pursuant to 5 U.S.C. 860, 868, 869, as well as the Personnel Regulations and Procedures set forth in the District of Columbia Personnel Manual.

5. Defendants, WALTER N. TOBRINER, JOHN B. DUNCAN, and BRIGADIER GENERAL F. J. CLARKE, are the duly appointed, acting and qualified Commissioners of the District of Columbia Government and as such are charged by law among other things with the supervision of personnel activities of the District of Columbia Government, where plaintiff was employed. Their official residence is in the District of Columbia.

6. Defendants, JOHN W. MACY, JR., FREDERICK J. LAWTON, and ROBERT E. HAMPTON, are the duly appointed, acting and qualified Commissioners of the United States Civil Service Commission and as such are responsible for the approval and administration of departmental personnel regulations and appeals by Civil Service personnel employed by the District of Columbia Government. Their official residence is in the District of Columbia.

7. Plaintiff seeks by this action to recover salary for the period following his wrongful separation from employment at Grade GS-12 in

the Department of Public Health of the Government of the District of Columbia as a result of the arbitrary and capricious action on the part of officials of the Government of the District of Columbia in effecting his separation under the guise of a procedurally proper reduction-in-force, together with the improper review procedure followed by the Civil Service Commission.

8. Plaintiff entered upon his Federal government service on April 1, 1941, with the War Department in Washington, D. C. On October 1, 1941, plaintiff received Classified Civil Service Status with the War Department. He is a career employee.

9. On February 2, 1953, plaintiff, holding classified status, was transferred to the position of Position Classifier (GS-9) in the Department of General Administration of the District of Columbia Government from the Office of Price Stabilization. This was a regular appointment. In August of 1953, plaintiff was transferred to the Department of Public Health (hereinafter the Department) at Grade GS-11, under authority of Joint District of Columbia Government and Civil Service Commission Regulations Para. 13. In 1954 he was promoted to Grade GS-12.

10. In April 1957, plaintiff was issued a letter of criticism concerning his work performance by the Chief, Administrative Management Division of the Department, which letter contained false and misleading statements which were most serious. After unsuccessful efforts to have the statements acknowledged to be false, plaintiff initiated a grievance appeal under the applicable agency regulations. Following a full hearing, the Grievance Committee recommended that the false letter of criticism be removed from plaintiff's personnel file. This determination was adopted by the Departmental officials on November 25, 1957. Plaintiff's performance rating was at all times "satisfactory."

11. As a result of the embarrassment which the outcome of the grievance proceeding had caused and desiring to retaliate against

plaintiff, Department officials embarked upon a scheme to cause plaintiff's separation. On February 6, 1958, plaintiff was issued a notice of separation on March 10, 1958, by reduction-in-force, which notice provided in part:

> "This action results from your position being abolished because of an internal reorganization and realignment of duties and responsibilities within the Department of Public Health."

13. At the time no Departmental reorganization was either effectuated or proposed that required a bona fide separation of plaintiff by reduction-in-force. Plaintiff was alone on the retention register and was the only employee in the entire Department so affected. No other person was demoted or separated in the Department. There was no budget curtailment because the new plan of organization called for an increase rather than a decrease in the number of journeyman classifiers. There were continuing journeyman positions to which plaintiff could be appointed. A journeyman classifier was added to the rolls after notice of separation due to reduction-in-force was issued to plaintiff, without offering plaintiff this position. No new position descriptions were prepared to formalize the alleged reorganization. Plaintiff was not afforded retreat rights to continuing journeyman classifier positions occupied by employees with lower retention rights. The District of Columbia Personnel Office wrongfully advised plaintiff that the Civil Service Commission regulations made it impossible to extend him bumping rights. A formal explanation given plaintiff as to the reason for the reorganization was incorrect.

13. He was denied the right of agency appeal or hearing upon his specific request made in writing on March 7, 1958, and again on March 10, 1958.

14. Plaintiff appealed his separation to the Appeals Examining Office of the Civil Service Commission (hereinafter "the Commission") on February 17, 1958, and requested a hearing. After an improper

and inadequate investigation, the Appeals Examining Office rejected plaintiff's request for a hearing, and on May 13, 1958, improperly denied plaintiff's appeal and wrongfully concluded among other things that plaintiff was not entitled to the procedural guarantees of classified status.

15. On May 21, 1958, plaintiff appealed to the Commission's Board of Appeals and Review and specifically raised the issue of plaintiff's status as a classified employee, in addition to other procedural defects in his separation, and the arbitrariness and capriciousness of the agency in retaliating against plaintiff. On February 6, 1959, the Board of Appeals and Review denied plaintiff's appeal and advised that the Commission would exercise no jurisdiction over the agency's failure to follow its own regulations in denying plaintiff a personal hearing and agency appeal. It also refused to investigate the propriety of the separation.

16. On March 16, 1959, plaintiff appealed to the District of Columbia Government again raising the issue of the District's failure to comply with its own regulations. Plaintiff also requested assistance from the Commission's Board of Appeals and Review on the issue of agency compliance with its own regulations in a letter dated May 15, 1959.

17. On April 6, 1960, plaintiff appealed to the Commissioners of the Civil Service Commission pointing out that neither the District of Columbia Government nor the Commission's Board of Appeals and Review had replied to his appeal regarding failure of the District to follow its own regulations. On April 25, 1960, the Commissioners denied plaintiff's appeal.

18. Plaintiff again requested the District of Columbia Government to grant him a hearing in accordance with its personnel regulations. This request was made by registered mail; however, no reply to this request was ever received. In 1960 he sought the assistance of a local counsel to prepare a case for presentation to the appropriate court. After several months review, the attorney approached was

unable to take the case and plaintiff then retained his present attorney, who, after a thorough review filed a petition in the United States Court of Claims on March 20, 1961. After considerable delay on the part of the government in obtaining information necessary to answer the case, the United States Government, on August 8, 1961, filed a motion to dismiss on the ground that the Court of Claims lacked jurisdiction to pay back salary for separations from the District of Columbia Government. Oral argument on the case was set down for February 6, 1962. During the oral argument on the case the Court announced that it would hear only that part of the case involving the alleged improper review by the Civil Service Commission. Plaintiff's attorney advised the Court that plaintiff did not wish to limit his review only to those matters, but wished to have the matter heard by a court which would hear the entire separation process. The Court then granted to plaintiff an extension of time to withdraw his case from the Court of Claims for the express purpose of filing a bill of complaint before a court which would review the facts surrounding plaintiff's separation from the District of Columbia Government as well as the actions of the Civil Service Commission. By order dated March 16, 1962, this motion was allowed and the petition was withdrawn in order that the suit herein could be filed.

19. As a result of the arbitrary and capricious action on the part of the officials of the District of Columbia Government in conspiring to separate plaintiff under the guise of a reduction-in-force, when in fact no reduction-in-force took place, in order to retaliate against plaintiff for his having prevailed in a previous grievance procedure, and as a result of the failure of the official of the District of Columbia Government to follow the applicable procedures and accord to plaintiff his right of appeal hearing, reassignment and/or retreat rights, plaintiff was improperly separated on March 10, 1958, from his position of Position Classifier, GS-12.

WHEREFORE, plaintiff prays that defendants be ordered to restore him to the duty and pay status of a Position Classifier, GS-12, or a position of like seniority status and pay, as of March 10, 1958, and that he be granted the benefit of all rights, emoluments and privileges flowing from a continuity of service from the time of his wrongful separation on March 10, 1958, to the date of his restoration to grade, including back salary for said period as if said separation had not taken place and for such other relief as may be proper.

JOHN I. HEISE, Jr.
Attorney for Plaintiff

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[*Filed July* 27, 1962]

## ANSWER

Come now the United States Civil Service Commission defendants by their attorney, the United States Attorney for the District of Columbia, and for answer to the complaint herein aver as follows:

### First Defense

Plaintiff has been guilty of such laches as should in equity bar him from maintaining this action, in that, he is here seeking restoration to duty and back pay running from March 10, 1958; the final administrative decision denying his appeal to the Civil Service Commission was entered on February 6, 1959; and this action was instituted on April 23, 1962, some three years and two months after the final administrative decision on his appeal.

### Second Defense

Answering specifically the allegations of the complaint,

1 and 2. The allegations of paragraph 1 and 2 are admitted.

3. The allegations of Paragraph 3 are admitted except that fendants deny Plaintiff was a "Classified Civil Service employee" at the relevant times, insofar as that phrase impliedly asserts he was at the relevant time or times employed in the classified (competitive) Civil Service, and further deny his separation on March 10, 1958 was wrongful.

4, 5 and 6. The allegations of paragraphs 4, 5 and 6 are admitted.

7. The allegations of paragraph 7 are admitted, except that defendants deny plaintiff's separation was wrongful; deny the separation action taken in his case was arbitrary or capricious; deny his separation was effected under a guise; and further deny the review procedure followed by the Civil Service Commission was in any way improper.

8. The allegations of paragraph 8 are admitted, except that defendants deny plaintiff is a career employee, insofar as that term impliedly asserts he was at the time of separation employed in the classified (competitive) Civil Service.

9. The allegations of paragraph 9 are admitted, except that defendants aver the position plaintiff occupied in the Department of Health was excepted from the classified (competitive) Civil Service.

10, 11,12,13 and 14. The averments contained in the answer of the D. C. Commissioner defendants to paragraph 10, 11, 12, 13 and 14 are adopted and incorporated herein by reference.

15. The allegations of paragraph 15 are denied, insofar as they impliedly aver plaintiff's status in a position within the classified (competitive) Civil Service, before he entered on duty in the District of Columbia Department of Health, is in any way a material issue; insofar as they aver there were any procedural defects in his separation; insofar as they aver there was any arbitrariness of capriciousness or retaliatory action, on the part of the agency; insofar as they aver there was any failure by the agency to follow its own regulations; and insofar as they aver the defendants refused to investigate the propriety of plaintiff's separation.

16. The averments contained in the answer of the D.C. Commissioner defendants with respect to the first allegation of paragraph 16 are adopted and incorporated herein by reference. The second allegation of paragraph 16 is immaterial; but if answer is required, it is denied; and, by way of affirmative defense thereto, defendants aver their records fail to disclose plaintiff's letter of May 15, 1959 was received by them.

17. The allegations of paragraph 17 are admitted.

18. The averments contained in the answer of the D.C. Commissioner defendants to paragraph 18 are adopted and incorporated herein by reference.

19. The allegations of paragraph 19 are denied, and, by way of affirmative defense to these allegations, defendants aver plaintiff's separation was proper and in full afcord with law.

JOSEPH M. HANNON
Assistant United States
Attorney
GIL ZIMMERMAN
Assistant United States
Attorney

DAVID C. ACHESON
United States Attorney
CHARLES T. DUNCAN
Principal Assistant United
States Attorney

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[*Filed July* 27, 1962]

## ANSWER OF DEFENDANTS, WALTER N. TOBRINER, JOHN B. DUNCAN AND BRIGADIER GENERAL F. J. CLARKE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA

### First Defense

Walter N. Tobriner, John B. Duncan and Brig. Gen. F.J. Clarke say that the complaint fails to state a claim against them upon which relief can be granted.

## Second Defense

Plaintiff has been guilty on such laches as should in equity bar him from maintaining this action, in that, he is here seeking restoration to duty and back pay running from March 10, 1958; the final administration decision denying his appeal to the Civil Service Commission was entered on February 6, 1959; and this action was instituted on April 23, 1962, some three years and two months after the final administrative decision on his appeal.

## Third Defense

1, 2, 3, 4, 5, 6, 7, 8, & 9. The allegations contained in the answer of the United States Civil Service Commission to paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8 & 9 of the complaint are adopted and incorporated herein by reference as the answer of these defendants.

10. These defendants deny the allegations contained in paragraph numbered 10 of the complaint.

11. In answer to paragraph numbered 11 of the complaint, these defendants deny the allegations contained in the first complete sentence of said paragraph and admit the allegations contained in the last sentence of said paragraph.

12. These defendants admit the allegations contained in the second and third sentences of paragraph numbered 12 of the complaint and deny each and every remaining allegation of said paragraph.

13. These defendants deny the allegations contained in paragraph numbered 13 of the complaint.

14. In answer to paragraph numbered 14 of the complaint, these defendants admit that the plaintiff appealed his separation to the Examining Office of the Civil Service Commission and deny each of the remaining allegations.

15, 16 & 17. The allegations contained in the answer of the United States Civil Service Commission to paragraphs numbered 15, 16, and 17 of the complaint are adopted and incorporated herein by

reference as the answer of these defendants. The first allegation of para. 16 is admitted.

18. In answer to paragraph numbered 18 of the complaint, these defendants say they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

19. The allegations contained in the answer of the United States Civil Service Commission to paragraph numbered 19 of the complaint are adopted and incorporated herein by reference as the answer of these defendants.

CHESTER N. GRAY
Corporation Counsel, D.C.

JOHN A. EARNEST
Assistant Corporation Counsel, D.C.

GEORGE N. CLARK
Assistant Corporation Counsel, D. C.

Attorneys for Defendants

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[*Filed October* 4, 1962]

MOTION FOR THE PRODUCTION AND INSPECTION OF DOCUMENTS UNDER FEDERAL RULE 34

Plaintiff, ANDREW R. PENCE, moves the Court for an Order requiring defendants to produce and permit the plaintiff to inspect and copy each of the following documents:

1. Reorganization chart referred to by Henry S. Laguillon, Chief, Administrative Management Division, Department of Public Health, District of Columbia Government, in his memorandum to plaintiff, dated February 14, 1958.

2. Official position description for Position Classifiers in Department of Public Health for period immediately prior to 1958 reorganization of Department, including descriptions for positions at Glenn Dale and D. C. General Hospital.

3. Official position description for Position Classifiers, GS-9, GS-11 and GS-12, in Department of Public Health, approved for period immediately following reorganization of 1958.

4. Official Notification of Personnel Action from the period of 1953 to the reorganization of 1958 for the following Position Classifiers: James Smith, Virginia Cady, Jeremiah Riordan, Robert Wilson, and Paula McConley.

5. Official Personnel Actions for 1958 and 1959 for the following Position Classifiers, James B. Edwards, Andre LaGagneux, and Emily G. Field.

6. Official position description for position GS-13 in the Health Department held by Henry S. Laguillon from August 16, 1953 to March 11, 1956, and official position description for Laguillon at grade GS-14 from March 11, 1956 through 1958 (period after the reorganization).

7. Budgetary proposals for Department of Public Health processed through the District of Columbia Budget Office in connection with the reorganization of 1958, together with action memoranda or reports from District of Columbia Budget Office on said proposal and proposals or requests submitted to Congressional Subcommittee on Appropriations for the District of Columbia for same period.

8. Minutes of meetings of District of Columbia Commissioners referred to in memorandum from Dr. Daniel Leo Finucane to plaintiff of March 7, 1958, and parts of minutes of District of Columbia Commissioners in February 1958 and on or about March 6, 1958, wherein actions relative to plaintiff were discussed.

9. Civil Service Commission classification survey report of District of Columbia Department of Public Health made in 1957 or early 1958.

10. Copies of all memoranda, reports and directives between the District of Columbia Department of Health and/or Personnel Division of the District of Columbia and the Civil Service Commission relative

to compliance with classification action requested in the Civil Service Commission classification survey report of 1957-1958.

11. Copies of all memoranda between District of Columbia Department of Public Health and other offices of the District of Columbia Government relative to the proposal for the 1958 reorganization and subsequent approval thereof.

12. Copy of Joint Financial Report Form No. 11, "Quarterly Statement of Receipts and Expenditures of Federal Funds for Health Services" for the District of Columbia Government for 1957 and 1958, and all memoranda prepared in connection therewith relative to the certification of the report.

13. Memorandum or directive from officials of the District of Columbia Government requesting police assistance in ordering plaintiff from his desk on May 12, 1958.

Defendants have the possession, custody, or control of all of the foregoing documents. The documents itemized are required to enable plaintiff to prepare his case in the captioned matter.

JOHN I. HEISE, JR.

Notice of Motion

To: Mr. George H. Clark
Assistant Corporation Counsel, D.C.
District Building
Washington 4, D.C.

To: Mr. David C. Acheson
United States Attorney
U.S. Court House
Washington, D.C.

Please take notice that the undersigned will bring the above motion on for hearing before the United States District Court for the District of Columbia on the _____day of October, 1962, at 10:00 a.m. or as soon thereafter as counsel can be heard.

JOHN I. HEISE, JR.

EXHIBIT "A"

DISTRICT OF COLUMBIA: SS

ANDREW R. PENCE, being duly sworn, deposes and says:

1. That he is the plaintiff herein, that he is competent to make this statement and has personal knowledge that the matters stated herein are true.

2. That the documents and material requested in the Motion under Rule 34 should be in the possession and control of the defendants and the production thereof will enable plaintiff to prepare his full case in this proceeding.

ANDREW R. PENCE

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

Rule 34, Federal Rules of Civil Procedure

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[*Filed October* 12, 1962]

OPPOSITION OF DEFENDANTS MACY, LAWTON AND HAMPTON TO PLAINTIFF'S MOTION FOR PRODUCTION AND INSPECTION OF DOCUMENTS

Come now the defendants John W. Macy, Jr., Frederick J. Lawton and Robert E. Hampton, members of the United States Civil Service Commission and through their attorney the United States Attorney for the District of Columbia oppose plaintiff's motion for production and inspection of documents for the following reasons:

1. Judicial review of a reduction in force is limited to review of the administrative record. Cases like the one at bar are properly determined on motion for summary judgment without discovery or reference to facts de hors the record. Powell v. Brannan, 91 U.S. App. D.C. 16, 196 F.2d 871 (1952). The administrative record of the Civil Service Commission will be filed with the Court by these defendants.

2. Of the documents requested by plaintiff only items 9 and 10 are in the possession of these defendants. These documents are not

relevant or material to the issues at bar. Discovery should not be allowed when the facts which may be elicited can have no relevance. O'Brien v. Equitable Life, 14 F.R.D. 41 (W.D. Mo. 1953).

3. A jurisdictional defense of laches has been raised by the pleadings. Jurisdictional questions should be decided before extensive discovery is allowed. F.C. Simonin's Sons, Inc. v. American Can Co, 30 F. Supp. 901 (E.D. Pa. 1939); Blair Holdings Corp. v. Rubenstein, 1959 F. Supp. 14, 15 (S.D.N.Y. 1954); cf: United Transport Service v. National Mediation Board, 85 U.S. App. D.C. 353, 359-360, 179 F.2d 446, 453-454 (1949).

For these reasons, and such other reasons as may be advanced on oral hearing, it is respectfully submitted that plaintiff's motion for production and inspection should be denied.

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[*Filed October* 25, 1962]

**OPPOSITION OF DEFENDANTS WALTER N. TOBRINER, JOHN B. DUNCAN AND BRIGADIER GENERAL F. J. CLARKE TO PLAINTIFF'S MOTION FOR PRODUCTION AND INSPECTION OF DOCUMENTS**

Defendants Tobriner, Duncan and Clarke oppose plaintiff's motion for production and inspection of documents for the reason that plaintiff has failed to make the requisite showing of good cause required under Rule 34 of the Federal Rules of Civil Procedure.

Plaintiff's motion filed under Rule 34 and the exhibit attached thereto contains only the conclusions of plaintiff's counsel and the plaintiff. It is concluded that the documents and material requested are in the possession of the defendants and that inspection of said documents will enable the plaintiff to better prepare his case for trial. Conclusions and opinions of the plaintiff or his attorney do not constitute a showing of good cause under Rule 34, F.R.C.P. Gunderson v. Moran Transportation Corporation (D.C.S.D.N.Y., 1953), 15 F.R.D.111. Plaintiff's motion and attached exhibit fails to demonstrate that the documents sought to be produced constitute material and relevant evidence admissible at trial or that it is reasonably probable that said

documents may constitute such evidence. The failure of the plaintiff to include in either the motion or the affidavit facts demonstrating good cause calls for a denial of plaintiff's motion. 4 Moore's Federal Practice, Second Edition, 1950, Section 34.07, page 2442.

The affidavit of the plaintiff does not set forth the matter provided for in Official Form Number 24, Federal Rules Service, Current Volume, pages 177 to 178. In this regard plaintiff's affidavit is deficient, in that it fails to demonstrate factually that the documents and material requested are relevant and material and, therefore, admissible at trial. Alternatively, it is not shown that the documents, if not themselves relevant and material, are reasonably calculated to lead to the discovery of material evidence. Moreover, plaintiff's affidavit does not indicate that the material sought is in the possession of these defendants. Plaintiff says only that the material "should be in the possession and control of the defendants." From this it would appear that plaintiff does even know the documents requested exist, nor, indeed, if they do exist whether they are in the control and possession of these defendants.

Based upon the foregoing, these defendants request the Court to deny plaintiff's motion to produce for the reason that it fails to comply with Rule 34 of the Federal Rules of Civil Procedure.

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[*Filed November* 16, 1962]

SUPPLEMENTAL AFFIDAVIT (EXHIBIT "A") FOR SUPPORT OF MOTION FOR PRODUCTION AND INSPECTION OF DOCUMENTS UNDER RULE 34

DISTRICT OF COLUMBIA: SS

ANDREW R. PENCE, being duly sworn, deposes and says that:

1. He is the plaintiff herein, that he is competent to make this affidavit and has personal knowledge of the matters stated herein, and knows them to be true.

2. Documents numbered in the motion for production as numbers 1, 2, 3, 4, 5, 6, 7, 8, 11, 12 and 13 are in the possession of or in files

under the control of defendants TOBRINER, DUNCAN AND CLARKE. Documents numbered 9 and 10 are in the possession of or in files under the control of defendants MACY, LAWTON and HAMPTON.

3. Document No. 1, the reorganization chart, is relevant and material to the issue that the reduction was not bona fide, but was an action designed to separate plaintiff alone. The chart was referred to by Mr. Laguillon in memoranda which he used to support the legality of plaintiff's separation.

4. The position descriptions listed as Item No. 2, will establish the classifier jobs which existed prior to the so called "bona fide" reorganization and supplement the organizational framework as it existed prior to the "bona fide" reorganization.

5. The descriptions requested in Item No. 3 will show the organizational picture after the so called "bona fide" reorganization and establish how the reorganization was accomplished and what merger or consolidation of positions was made, and how the functions or duties were spread both vertically or horizontally as a result of the alleged "bona fide" reorganization.

6. The personnel actions requested under Item No. 4 will establish the grades and positions of position classifiers as they existed immediately prior to the "bona fide" reorganization.

7. The personnel actions requested in Item No. 5 will show what actions were taken immediately after the "bona fide" reorganization and will establish whether, in fact, competing personnel were promoted at the same, or shortly after the time that plaintiff was separated. These will also complete the reorganizational picture in terms of actual workers on the roles.

8. The position descriptions requested under Item No. 6 for Mr. Laguillon will establish whether, in fact, he was given the additional duties which had previously been assigned to plaintiff following the reorganization. It has been alleged that plaintiff's job was abolished and that Laguillon, in his supervisory position, assumed these duties after the "bona fide" reorganization.

9. The budgetary proposals requested in Item No. 7 will establish whether more money was requested for the division during the period of reorganization or whether less money was requested. The so called basis for the "bona fide" reorganization was that funds and budgetary controls required the elimination of positions. Since plaintiff's job was the only one eliminated, it is necessary to review the actual budgetary proposals.

10. The minutes requested under Item No. 8 will establish the basis upon which the Administrative Management Division of the Department of Public Health justified plaintiff's separation to the District Commissioners themselves. Memoranda addressed to plaintiff from Dr. Finucane referred to such minutes in justification of the action against plaintiff. The truth or falsity of these statements can only be ascertained after a review of the minutes.

11. The Civil Service Commission made a survey report of the District of Columbia Department of Public Health in 1957 and 1958, before the reorganization. Plaintiff is contending that the reorganization was a sham designed to eliminate plaintiff. It is very material and relevant to the issue to establish the Civil Service Commission's recommendation with respect to increase or decrease of personnel and/or consolidation of functions. The memoranda in Item No. 10 are relevant to the same issue and will establish whether the Civil Service Commission survey and actions taken pursuant thereto included the elimination of plaintiff's position.

12. The memoranda requested under Item No. 11 will furnish contemporaneous reasoning in support of the reorganization. One set of reasons were given to plaintiff, but it is plaintiff's position that these reasons were wholly false and that there was no necessity to eliminate his position.

13. The certification contained in the report referred to as Item No. 12, provides that all employees to be separated are offered a hearing pursuant to regulations. This was not done in plaintiff's case

and he was denied both a hearing and the right of appeal to the Civil Service Commission. The report and memoranda in Item 12 will establish that the District of Columbia Government is advising Congress in writing that such guarantees are available when, in fact, they were denied to plaintiff.

14. The memoranda referred to in Item No. 13 will establish the method used in removing plaintiff from the office, all of which was part of an arbitrary and capricious action designed to embarrass plaintiff, and is not the normal practice in a reduction in force procedure.

ANDREW R. PENCE

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[*Filed January* 31, 1963]

## ORDER FOR THE PRODUCTION AND INSPECTION OF DOCUMENTS UNDER FEDERAL RULE 34

This case having come before the Court upon plaintiff's motion for production under Federal Rule 34 and upon the opposition of defendants filed thereto, it is this 31st day of January, 1963.

ORDERED that defendants Tobriner, Duncan, and Clarke be, and they are hereby ordered to produce documents designated as Nos. 1, 2, 3, 6 and the copy of joint financial report No. 11 set forth as document 12 in plaintiff's motion, and

IT IS FURTHER ORDERED that defendants Macy, Lawton, and Hampton be, and they are hereby ordered to produce for inspection and copying the document listed as No 9 in plaintiff's motion.

V. B. Jones
Judge

John I. Heise, Jr.
Attorney for plaintiff
George H. Clark
Assistant Corporation Counsel
Arnold T. Dikens
Assistant United States Attorney

*Filed January* 16, 1964

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, through his attorney, respectfully moves the Court for an order granting Summary Judgment in his behalf on the ground that, based upon the pleadings filed herein and the affidavit and exhibits attached hereto, there is no genuine issue as to any material fact and plaintiff is entitled to Judgment as a matter of law.

JOHN I. HEISE, JR.

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DISTRICT OF COLUMBIA: SS

ANDREW R. PENCE, being first duly sworn, deposes and says that:

1. He is the plaintiff in the captioned matter, he has personal knowledge of the facts and matters stated herein, and he knows them to be true. He is competent to make this affidavit.

2. He first entered Federal Government service on April 1, 1941, with the War Department in Washington, D.C. On October 1, 1941, while with the War Department, plaintiff received classified Civil Service status. He is a career employee.

3. At no time did plaintiff relinquish his classified Civil Service status, nor was he issued any notification terminating his classified Civil Service Status.

4. By notice dated January 30, 1953, plaintiff was appointed by transfer to the position of Position Classifier (GS-9) in the Department of General Administration in the District of Columbia Government from the Office of Price Stabilization (see Exhibit 1).

5. By notice effective August 10, 1953, plaintiff was transferred to the position of Organization and Methods Examiner (GS-11) in the Division of Administrative Management, Department of Public Health, District of Columbia Government (Exhibit 3). By notice dated June

23, 1954, plaintiff was promoted to the grade of GS-12, Position Classifier (Exhibit 4).

7. During 1955 friction developed between plaintiff and his supervisor, the Chief of Administrative Management, Mr. Laguillion. The basis for the friction was Mr. Laguillion's insistence that plaintiff carry on position classification operations according to Laguillion's personal desires rather than specific laws and regulations, approved Civil Service classification practices and techniques, and considerations of equitable treatment which plaintiff knew, as the Chief Classifier, it was his obligation to observe.

8. In the fall of 1955 incidents occurred which reflected the atmosphere that existed. One was an attempt to put the blame on plaintiff for embarrassment suffered by Laguillion as a result of his having signed a classification document without having read it or noting its significance. In the end Laguillion was exposed to be at fault. Another incident occurred when Laguillion, as Chairman of the "One-Fund Drive" for the Department, attempted to pressure plaintiff through misrepresentation into a larger contribution than had been indicated.

9. The friction between Mr. Laguillion and plaintiff increased over the months. On April 11, 1957, he gave plaintiff a satisfactory rating countersigned by Laguillion's supervisor, the Executive Officer, but at the same time gave plaintiff a memorandum containing criticisms which were vague and general and lacked specificity. Plaintiff concluded that the statements were of serious nature, irregular in procedure, and that they were so unwarranted in fact, that it was incumbent upon Mr. Laguillion to furnish specific examples to support the charges as required by performance rating regulations.

10. Plaintiff addressed a memorandum to Laguillion requesting an explanation of the basis for the criticisms and asking for examples which would enable plaintiff to understand and correct whatever deficiencies Laguillion thought existed. When Laguillion refused the

request, plaintiff requested a meeting with the Executive Officer. The stenographic report of this meeting, held on May 2, 1957, reflects Laguillion's emotional attitude in his effort to defend without success his stand that he was under no obligation to provide specific information in support of his generalized criticisms. The meeting closed by the Executive Officer ordering Laguillion to furnish plaintiff the information. However, on May 9, 1957, plaintiff was informed by a memorandum signed by Laguillion, and countersigned by the Executive Officer, stating that Laguillion did not feel it was required that he supply specific examples.

11. Plaintiff then proceeded to present the matter as a grievance under District of Columbia Government procedures. At the outset it was established that Laguillion, as the administrator of grievance procedure for the Department, had failed to comply with an order of the District of Columbia Commissioners by not even establishing a grievance procedure for the Department. Compliance was effected immediately. The first person designated as the representative of the Director of Health on the grievance committee was disqualified when it was revealed that this nominee was a personal friend of Mr. Laguillion. Eventually a hearing took place.

12. Under date of November 25, 1957, approximately six months beyond the deadline stipulated in the District of Columbia grievance regulations, a decision was handed down by the grievance committee in plaintiff's favor. The Committee recommended either that plaintiff be furnished sufficient additional information to enable him to understand the criticisms of Mr. Laguillon, or that the memorandum be excluded from plaintiff's official record (Exhibit 5).

13. The failure of the Committee to rule in favor of Mr. Laguillion caused embarrassment and resentment on his part in view of his official responsibilities.

14. Additional friction was generated by the persistent efforts of Mr. Laguillion to circumvent established personnel controls. On

June 27, 1957, plaintiff's concern in this regard reached a point where he felt compelled to address a memorandum to Mr. Laguillion entitled "Undesirable Conditions in Classification Operations caused by Deviation from Accepted Practices." In this document plaintiff pointed out the damage being done to the classification program due to misunderstandings, embarrassment, and dissipation of manpower, which was already inadequate. In September and October 1957 the situation became so critical that on one occasion an employee in Laguillion's office used ink eradicator to change entries by the Director in an effort to legalize an improper action.

15. On February 6, 1958, plaintiff was issued a notice of proposed separation by reduction in force, effective March 10, 1958 (Exhibit 6).

16. It was known to Health Department officials that the classification workload in plaintiff's division would be unusually heavy for several months beginning in February 1958, by reason of a classification audit being completed by the Civil Service Commission. By letter dated February 19, 1958, (Exhibit 7 attached), which referenced an advance oral report, the Commission submitted its findings to the District of Columbia Government itemizing a lengthy list of classification matters to be accomplished. A required compliance report was forwarded by the District of Columbia Government to the Civil Service Commission on May 11, 1958 (attached Exhibit 8) and by another required compliance report dated August 18, 1958, the Department of Public Health advised the Commission for further actions it had taken in classification and of some of the actions it had not yet been able to accomplish (attached Exhibit 9).

17. As indicated above the scope of the Department of Public Health's Classification program demanded an increase in position classifiers rather than a decrease or elimination of positions. Accordingly, on February 5, 1958,[1] one day before issuance of reduction in

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[1] Action issued on February 5, approved on February 6, and oath taken on February 10, 1958 (see Exhibit 11).

force notice to plaintiff, a new position classifier, one James B. Edwards, Jr., was hired (attached Exhibit 10) and by notice dated August 8, 1958, Edwards was promoted to grade GS-11 and transferred from Glen Dale Hospital to the Administrative Management Division (attached Exhibit 11).

18. By letter dated February 8, 1958 (attached Exhibit 12), plaintiff replied to the reduction notice. On February 12, 1958, the Government of the District of Columbia replied (attached Exhibit 13).

19. On February 14, 1958, plaintiff addressed a memorandum to Henry S. Laguillion (attached Exhibit 14), and on the same date received a reply (attached Exhibit 15).

20. By letter dated February 24, 1958 (attached Exhibit 16), plaintiff appealed his reduction to the Board of Commissioners, D.C. Government.

21. By memorandum of March 4, 1958, plaintiff requested from the D.C. Personnel Office a list of those positions to which he could exercise bumping rights (attached Exhibit 17).

22. By letter dated March 5, 1958, the District of Columbia Personnel Office replied (attached Exhibit 18). The retention register of February 6, 1958 (attached Exhibit 19) listed plaintiff only.

23. By memorandum dated March 7, 1958, addressed to the Director of Public Health (attached Exhibit 20), plaintiff requested a grievance appeal. On March 7, 1958, the Director of Public Health denied plaintiff's request (attached Exhibit 21). By memorandum dated March 10, 1958 (attached Exhibit 22), plaintiff again requested the opportunity to be heard by way of a grievance appeal clearly stating that there was a sound basis for it. On March 10, 1958 (attached Exhibit 23), this request was also denied.

24. By letter dated March 6, 1958, Congressman John L. McMillan addressed an inquiry to the D.C. Commissioners about plaintiff's alleged reduction (attached Exhibit 24). By letter dated March 10, 1958, the Commissioners replied to Congressman McMillan (attached Exhibit 25).

25. On February 17, 1958, plaintiff acting through his then attorney, advised the Civil Service Commission of his intention to appeal alleged reduction (attached Exhibit 26).

26. By letter dated March 14, 1958, plaintiff detailed to the Commission the reasons for his appeal (attached Exhibit 27). On March 24, 1958, the Commission acknowledged the appeal and advised of the commencement of its investigation (attached Exhibit 28). By letter dated April 25, 1958, plaintiff was denied a hearing by the Commission (attached Exhibit 29).

27. By decision of May 13, 1958, plaintiff's appeal to the Commission's Bureau of Departmental Operations was denied (attached Exhibit 30). On May 21, 1958, plaintiff noted his appeal to the Commission's Board of Appeals and Review (attached Exhibit 31) and filed his brief on June 10, 1958 (attached Exhibit 32).

28. By decision dated February 6, 1959, plaintiff's appeal was denied by the Commission's Board of Appeals and Review (attached Exhibit 33).

29. In view of the Commission's decision on the grievance appeal aspect of the case, plaintiff wrote to the Director of Personnel of the District of Columbia on March 16, 1959, requesting further action on that issue (attached Exhibit 34). On May 15, 1959, plaintiff sought the assistance of the Commission's Board of Appeals and Review in connection with his request to the D.C. Government for action on the grievance issue (attached Exhibit 35).

30. By letter of April 6, 1960, plaintiff again requested that the Commission assist in obtaining a response from the District of Columbia Government (attached Exhibit 36). By letter of April 25, 1960, the Commission declined to take any action in this regard (attached Exhibit 37).

31. Plaintiff then proceeded to make direct inquiries of the D.C. Commissioners in an effort to obtain a hearing on his appeal in order to exhaust his administrative remedies and when by late 1960, his

efforts were unsuccessful, he conferred with successive attorneys in order to have his case evaluated and prepared for presentation to the appropriate Court.

32. On March 20, 1961, plaintiff's petition was filed in the U.S. Court of Claims (attached Exhibit 38) and the D.C. Government and the Civil Service Commission furnished material to the Department of Justice for responding to the claim as filed. After considerable delay on the part of the Civil Service Commission and the D.C. Government in submitting the necessary material to the Department of Justice, the Department on August 8, 1961, filed a motion to dismiss on the ground that the Court of Claims lacked jurisdiction in the case. The case was calendared for oral argument on February 6, 1962, and during the course of the oral argument the Judges of the Court of Claims advised plaintiff's attorney that the Court would not consider that part of the case which involved the District of Columbia Government, but would limit its review of the procedures and merits to the Civil Service Commission.

33. Plaintiff's attorney advised the Court that he did not wish to to have this review and the back payment consideration restricted only to those matters involving only the Civil Service Commission, and requested leave to withdraw the case from the Court of Claims for the purpose of filing in the United States District Court for the District of Columbia. By order dated March 16, 1962 (attached Exhibit 39), plaintiff's motion (Exhibit 40) was allowed and suit was filed in the United States District Court.

34. Following his separation, plaintiff was employed by the Library of Congress on June 27, 1958, at a lower grade and was successively promoted until he again reached grade GS-12 in the Commerce Department, April 15, 1962. Plaintiff's main salary loss occasioned by his separation and service period in a lower grade runs between March 10, 1958, and June 31, 1961.

ANDREW R. PENCE

## PLAINTIFF'S STATEMENT OF FACTS PURSUANT TO LOCAL RULE 9(h)

Most of the pertinent facts concerning plaintiff's improper separation are set forth in the detailed affidavit and exhibits referenced therein. These facts may be summarized for the purposes of this motion as follows:

1. Plaintiff first entered Federal Government service on April 1, 1941, with the War Department in Washington, D. C. On October 1, 1941, while with the War Department, plaintiff received classified Civil Service status (Complaint and Ans. par. 8). He is a career employee.

2. At no time did plaintiff relinquish his classified Civil Service status, nor was he issued any notification terminating his classified Civil Service status (Affidavit par.3).

3. By notice dated January 30, 1953, plaintiff was appointed by transfer to the position of Position Classifier (GS-9) in the Department of General Administration in the District of Columbia Government from the Office of Price Stabilization (see Exhibit 1). He retained his status as a classified employee despite his transfer to an excepted position.

4. Several transfers and promotions found plaintiff in a Grade GS-12 Position Classifier position in the Division of Administrative Management in 1954 (Exhibit 4).

5. During 1955 friction developed between plaintiff and his supervisor, the Chief of Administrative Management, Mr. Laguillion. The basis for such friction and the series of incidents resulting therefrom are detailed in plaintiff's affidavit.

6. The friction between Mr. Laguillion and plaintiff increased during 1956. Finally, on April 11, 1957, Laguillion gave plaintiff a satisfactory performance rating countersigned by Laguillion's supervisor, the Executive Officer, but at the same time gave plaintiff a

memorandum containing criticisms which were vague and general and lacked specificity. Plaintiff demanded an explanation of the basis for the criticisms and asked for examples of the alleged inadequacies. Failing to obtain such information, plaintiff took several administrative steps which culminated in a grievance proceeding.

7. During the grievance proceedings, it was established that Laguillion, as the administrator of grievance procedure for the Department, had failed to comply with an order of the District of Columbia Commissioners by not even establishing a grievance procedure for the Department. Compliance was effected immediately, and after some delay, a hearing took place.

8. On November 25, 1957, a decision was handed down by the Grievance Committee in plaintiff's favor, and the Committee recommended either that plaintiff be furnished sufficient additional information to enable him to understand the criticisms of Mr. Laguillion, or that the memorandum be excluded from plaintiff's official record (Exhibit 5).

9. This failure of the Committee to rule in favor of Mr. Laguillion caused embarrassment and resentment on his part in view of his official responsibilities, and served to add to the heavy air of unrest and friction between Laguillion and plaintiff.

10. Meanwhile, the classification workload for the Department had increased tremendously due to Civil Service Commission demands. A reorganization plan was approved providing for additional classifier positions, (Grade GS-11 and below). A request for an additional classifier for the staff was initiated on February 5, 1958, and approval and appointment followed on February 6, 1958 (Exhibit 10). The new classifier took the oath on February 10, 1958 (Exhibit 11).

11. On the very day of the action appointing the other classifier, February 6, 1958, plaintiff was issued a notice of proposed separation by reduction in force, effective March 10, 1958 (Exhibit 6). Of even greater surprise is the fact that several months later the new position

classifier was promoted to the grade GS-11 position which had been included in the approved reorganization plan (Exhibit 11).

12. Plaintiff immediately appealed his reduction to the Board of Commissioners of the District of Columbia (Exhibit 16), pointing out specifically that the proposed action was not bona fide but rather the spiteful result of Laguillion's prejudice and vindicative hate for plaintiff.

13. Plaintiff also specifically requested that as an employee with classified status he be accorded his full "bumping" rights (Exhibit 17). He was denied these rights on the ground that these rights did not apply to plaintiff by reason of his excepted appointment (Exhibit 18). Plaintiff was all alone on the register competing only with himself (Exhibit 19).

14. Plaintiff also requested that he be accorded a grievance appeal and hearing because his separation was not a bona fide reduction in force but a reprisal action against him alone (Exhibit 20). His request was denied (Exhibit 21).

15. Plaintiff also appealed his separation to the Civil Service Commission (Exhibit 26). The Commission refused to grant a hearing (Exhibit 29), and determined that it could not pass upon the "bona fide" aspect of the Reduction in Force itself (Exhibits 29, 30, 33).

16. The Commission's Bureau of Departmental Operations and Board of Appeals and Review improperly held that plaintiff was not entitled to an offer of reassignment or bumping rights by reason of his serving in an excepted position (Exhibits 30, 33).

17. In view of the Commission's refusal to investigate and pass upon the propriety of the reduction and on the failure of the Government of the District of Columbia to follow its own regulations, plaintiff again sought relief from the District Commissioners (Exhibits 34 and 36). The Commissioners refused to pass upon these contentions (Exhibit 37).

18. Following plaintiff's attempts in 1960 to obtain counsel, plaintiff filed suit in the Court of Claims early in 1961 (Exhibit 38), so that the defendants were at all times on notice that plaintiff had not abandoned his claim and was pressing vigorously to have it adjudicated. The issue of the right of the Court of Claims to award a money judgment as a result of actions by the District of Columbia was set down for argument in February 1962 (Complaint par. 18) and when the Court of Claims indicated that it would limit its review of the case solely to the procedures before the Civil Service Commission, plaintiff withdrew his petition for the "express purpose of filing a Bill of Complaint" before this Court to obtain complete review (Exhibit 40). Plaintiff thereupon filed suit here.

19. Meanwhile, on June 27, 1958, plaintiff was employed by the Library of Congress and on April 15, 1962 again reached the grade of GS-12 in the Commerce Department (affidavit par. 33).

JOHN I. HEISE, JR.
Attorney for Plaintiff

## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

### INTRODUCTION

This suit seeks a declaratory judgment and injunctive relief against unlawful action taken by officials of the District of Columbia Government and the Civil Service Commission. It seeks correction of records and restoration of salary lost following plaintiff's wrongful separation from his position of GS-12 Position Classifier in the District of Columbia Government on March 10, 1958.

Although the actions by officials of the District of Columbia were, by design, circuitous, thereby making the supporting record in this case quite voluminous. The basic issues are not unduly complex. Plaintiff can now establish through the exhibit material finally obtained

after a lengthy process leading up to this motion, that he, as a permanent employee with classified status, was entitled to the procedural guarantees of "bumping" and reassignment which were denied by both the District of Columbia officials and the Civil Service Commission under the mistaken concept that plaintiff had been divested of his status.

Moreover, plaintiff now establishes that the alleged reduction in force was not a valid reduction at all but an arbitrary act designed to eliminate only plaintiff. Therefore, under the regulations of the District itself, plaintiff was entitled to the guarantees of a grievance appeal and hearing to have the separation investigated and evaluated by the District itself. The failure to accord plaintiff these rights was error.

Finally, we show that plaintiff has been most diligent in not only pressing his rights administratively and in the Courts so that defendants at all times were on notice of his nonacquiescence in their scheme, but also in seeking and obtaining other employment so that the salary loss would be curtailed as much as possible and no prejudice to defendants whatsoever would arise as a result of any delay in having the matter finally adjudicated in Court.

## I. JURISDICTIONAL STATEMENT

This is a civil proceeding for declaratory judgment and for permanent injuctive relief and back salary arising under the laws of the District of Columbia and the United States for which this Court has jurisdiction under Title 28 of the United States Code in sections 1331 and 1332. Venue properly lies in the District of Columbia, the judicial district in which all the defendants reside 28 U.S.C. 1391(b).

This is, therefore, an "actual controversy" within the jurisdiction of this Court for which declaratory relief is appropriate. 28 U.S.C. 2201; United Public Workers v. Mitchell, 330 U.S. 75, 93. In conjunction with a declaratory judgment, further "necessary or proper" relief, including injunctive relief, may be granted. 28 U.S.C. 2202.

Furthermore, jurisdiction has been available, ever since American School v. McAnnulty, 187 U.S. 94, to give relief in equity against an unlawful or arbitrary order of an Agency or official. See, e.g., Board of Governors v. Agnew, 329 U.S. 441, 444; Stark v. Wickard, 321 U.S. 288, 290; Sheilds v. Utah Idaho R. Co., 305 U.S. 177, Ickes v. Fox, 300 U.S. 82; Larson v. Domestic & Foreign Corp., 337 U.S. 682, 689-690.

## II. PLAINTIFF AS A STATUS EMPLOYEE WAS ENTITLED TO REASSIGNMENT AND BUMPING RIGHTS

As defendants have admitted in their answer, plaintiff obtained Classified Civil Service Status on October 1, 1941, while serving with the War Department. His employment history both before and subsequent to his improper separation by the District of Columbia establishes that he is a career employee. At no time has plaintiff ever relinquished his status or had it taken from him by an effective agency action.

On January 30, 1953, he transferred (Complaint and answer par.9) to a position in the Government of the District of Columbia from a position in the Office of Price Stabilization. On August 10, 1953, he was transferred to a position in the District's Department of Health pursuant to the District's Joint Regulations Par. 13.

The Joint Regulations are issued by the District Commissioners under the authority of Executive Order No. 5491 of November 18, 1930, which provides:

> "The Commissioners of the District of Columbia and the United States Civil Service Commission have agreed that it would be in the interests of good administration to make appointments to positions under the government of the District of Columbia after tests of qualifications. The United States Civil Service Commission is, therefore, authorized to apply the principles of the Civil Service Act and rules, as far as may be done without incurring additional expense, by certifying to the Board of Commissioners the names of eligibles from appropriate registers established for the Federal service,

such certifications and appointments to be made under regulations agreed upon by the Board of Commissioners and the United States Civil Service Commission. Appointments and promotions to the Metropolitan Police and Fire Departments are already made in accordance with the Civil Service Act and rules, as provided by statute."

Paragraph 13 of these Regulations and paragraph under which plaintiff was transferred provides:

"Positions may be filled by transfer of a person in the Federal service or in the service of the District of Columbia upon certificate of the Civil Service Commission in accordance with civil-service rule X. An employee who is transferred to the government of the District of Columbia from a Federal position retains his status for retransfer to the Federal service subject to the provisions of the civil-service rules." [1]

Plaintiff therefore carried his status for retransfer and, as we show below, retained his status for reduction purposes despite his assignment by District Officials to an excepted position. The Attorney General has so recognized. 41 Opp. Atty. Gen. 18 (March 28, 1952).

Once having estabaished his entitlement to status and by regulation having preserved such status upon transfer to the District Government, plaintiff cannot be divested of such status through the whim or caprice of any District officials. The sanctity of such status was specifically upheld in Roth v. Brownell, 215 F.2d 500, 94 App. D.C. 318, cert. den. 348 U.S. 863. There it was established that once in the competitive service you retain your status despite Executive Orders or other directives to the contrary.

The Civil Service Commission in recognition of the validity of the

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1/ A footnote at the end of the section in the original text does not apply to plaintiff since it concerns War Service appointments only.

Roth decision, promulgated new regulations[2] to guarantee rights to those who had status but were bracketed into expected positions without express notice or otherwise, and who were reduced in force without the proper procedural guarantees. Bodson v. United States, (C.Cls.), 158 F. Supp. 948, 949. Plaintiff at all times continued as an employee with competitive status and he was therefore entitled to the rights applicable to such status.

Looking to these regulations we find that the Retention Regulations set forth in 5 CFR (1957 ed.) Part 20 apply. At the very outset the Civil Service Commission provides:

> "20.1 Extent of part. The regulations in this part establish degrees of retention preference and uniform rules for reduction in force. They apply to all civilian employees in the executive branch of the Federal Government, in those parts of the Federal Government outside the executive branch which are subject by law to the competitive civil service requirements, and in the municipal government of the District of Columbia, except those whose appointments are required to be approved by the Senate and those who are appointed by the President of the United States. (Sec. 20, 58 Stat. 391; 5 U.S.C. 869)." (Underscoring added).

These regulations then by their very definition include employees of the District of Columbia, such as plaintiff. Born v. Allen, 29 F.2d 345, 351 (CADC 1960).

Plaintiff was in Retention Group 1-E at the time of the alleged reduction (Exhibit 6). Since, as we have shown, he was not removed from the classified service, the provisions of 5 CFR 20.5(b) (2) applied in that:

> "(2) No employee in any subgroup of tenure group I or II who is willing to accept a reasonable change in position may be separated, furloughed for more than thirty (30) days, or subjected to greater reduction in pay than necessary under such

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2/ 20 Fed. Reg. 599, 601.

> reasonable change in position, (i) if he is qualified for a position which will last as long as three (3) months in another competitive level in his present competitive area in which an employee with lower subgroup standing is retained, or (ii) if he is qualified to go back to a position which will last as long as three (3) months from which he was promoted (or to an essentially identical position) in his present competitive area in which an employee with lower retention standing (and without retention priority based on a statutory retention right) is retained."

The latter part of this regulation refers to rights known as "Retreat Rights," which permit an employee to "retreat" to a position from which he was promoted or to a position which he skipped over in promotion of more than one grade or to a substantially similar position.

The record then shows that plaintiff could "retreat" to the position of Position Classifier GS-11 (Exhibit 4), Organization and Methods Examiner Position GS-11 (Exhibit 3), or Position Classifier GS-9 (Exhibit 2). The record goes on to show that the GS-11 (position 221-11) was available and continuing (Exhibit 11). The failure to accord plaintiff such retreat rights or to offer any reassignment as required by the regulations constituted error.

It is now firmly established that if a Government official or agency lawfully prescribes rules of procedure, these are binding on the Government as well as the citizens. Accardi v. Shaughnessy, 347 U.S. 260, 267; Bridges v. Wixon, 326 U.S. 135, 153; Chapman v. Sheridan-Wyoming Co. 338 U.S. 621; even where the administrative action under review is discretionary in nature. Coleman v. Brucker, 103 App. D.C. 283, 257 F.2d 661, 662; Accardi v. Shaughnessy, supra. in Service v. Dulles, 354 U.S. 363, it was held that even though the Secretary of State had absolute discretion to remove a Foreign Service Officer "whenever he shall deem such termination necessary or advisable in the interest of the United States," the Secretary's action could not stand when he departed from his own procedural regulations

in removing the Officer. The same rule was applied in Vitarelli v. Seaton, 359 U.S. 535, even when a discretionary power of removal was used in an effort to validate the removal of a "Schedule A" excepted employee, which was defective under Department regulations. See also, Watson v. United States, 355 U.S. 14, where, the Supreme Court reversed the Court of Claims in an action brought for back pay, and the Supreme Court again applied the rule that a Government administrator is bound by his own procedural regulations. It is most significant that in Watson the claimant was a probationary employee. The principle of these cases is controlling here.

The procedural omission entitles plaintiff to the relief sought.

## III. THE DISTRICT OF COLUMBIA FAILED TO COMPLY WITH ITS OWN REGULATIONS IN REFUSING PLAINTIFF'S GRIEVANCE APPEAL

Throughout these proceedings, it has been plaintiff's position that the attempted reduction was a sham. As we show below, the record amply supports this position. We contend in the alternative then that there was no legal reduction at all, and certainly no reason for one. The action of removal was simply a reprisal to separate plaintiff. Such proposed personnel actions arising out of job relations are properly subject to appropriate grievance procedures. The District government provided such procedures in Chapter 15 of its Manual.

Chapter 15 of the District Personnel Manual, entitled "Grievances and Appeals," provided:

> "These procedures are established to assure an avenue of approach wherein an individual employee may seek adjustment of a personal complaint or grievance arising out of individual working conditions or job relations. Grievances or appeals resulting directly from reduction in force, demotion, position classification actions, policies, and administrative practices are covered elsewhere in Chapter 15." (Underscoring added).

The grievance or appeal procedures to be covered elsewhere were never specifically set forth, but the Regulations which were covered in Section A go on to provide for complaint, hearing, witness appearance, a record, and decision. Any failure to accord plaintiff the benefit of the appropriate grievance procedures or any grievance procedure whatsoever constituted a failure on the part of District Officials to comply with their own regulations. Having failed to comply with their own regulations, the Commissioners' determination is without legal effect and must be set aside by this Court. Roth v. Brownell, supra; Mulligan v. Andrews, 211 F.2d 28, 93 App. D.C. 375; Manning v. Stevens, 208 F.2d 827, 93 App. D.C. 225; Deak v. Pace, 185 F.2d 997, 88 App. D.C. 50.

There is no question that plaintiff filed a timely notice of his complaint and grievance, for on February 24, 1958, 17 days after the initial notice of proposed separation, he detailed the reasons why the proposed separation was illegal in a letter to the President of the Board of Commissioners (Exhibit 16). On March 7, 1958, plaintiff requested that the procedure for processing his grievance appeal be set up (Exhibit 20). The District Officials, however, improperly rejected plaintiff's appeal (Exhibit 21). By appropriate notices of March 10, 1958, (Exhibit 22) and March 16, 1959 (Exhibit 34), plaintiff sought to have the District comply with its own regulations. These requests have been ignored.

The Civil Service Commission having specifically ruled that this issue was beyond its jurisdiction (Exhibit 33), it was incumbent upon the District to respond to the issue. This the District has failed to do. We must, therefore, ask the Court to now review the issue which the Commission refused to review and which the District elected to ignore.

It is apparent that the alleged reduction was designed only to "get" plaintiff. It was a diabolical scheme concocted by Laguillion to get even with plaintiff for plaintiff's previous grievance triumph. If

Languillion was dissatisfied with plaintiff and had reasons to support his dissatisfaction, a notice of charges or unsatisfactory performance was in order. Instead Laguillion hit upon the idea of a phony reduction in force whereunder Laguillion could hide without any hearing or procedure designed to bring the issues out into the open.

At the very time the District was saying plaintiff was surplus because he was a position classifier, the Civil Service Commission was reporting that the District had a heavy classification workload, needed further classification training programs and more effective coordination of existing programs, and much individual attention and action (Exhibit 7). In short the District needed more position classifiers. So, simultaneously with noticing plaintiff for separation as surplus, the District hired a new position classifier (Exhibit 10) and then promoted him to GS-11 (Exhibit 11). Such procedure cannot be tolerated. It makes a mockery out of the personnel process.

When the District's action was questioned by Congress (Exhibit 24), the District replied with a letter replete with misrepresentations (Exhibit 25). Without trying to unduly lengthen the record here, we only summarize these misrepresentations: [3]

1. Plaintiff had actually performed the journeyman functions at the outset and throughout the program, although the District implied otherwise.
2. Plaintiff had been responsible for getting the program underway and establishing the machining for its operation.
3. The position of Chief Classifier had not been established until one year after the program was in operation, although the District implied it was established at the outset.
4. The allocating authority was not delegated to the Chief, Administrative Management Division until 1955 and not in 1953 as represented.

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3/ Which are detailed on Exhibit 41.

5. Plaintiff had been both the working arm and the supervisory chief during the period and not simply non-working supervisor as represented.

There are many other errors in the District's report to Congress. However, we are not going to dwell on the question of administrative discretion to reassign or create new positions or modify existing positions. Such is not the function of the Court. However, we do point up the gross inaccuracy in the District's statements made in attempting to justify an illegal action.

In this respect, the case is quite analogous to that of T. Michael Smith, 150 C.Cls___, (decided November 2, 1960). There the Reconstruction Finance Corporation abolished Smith's position, assigned him no work for a year, reassigned him to the abolished job, and then issued him a reduction in force notice so that he was in the "absurd position of having only himself to compete with." The Court found there that plaintiff was "a victim of a scheme" to eventually separate only plaintiff under the guise of a procedurally proper reduction in force.

If the Civil Service Commission will not take jurisdiction and the agency (District Government in this case) refuses to treat the employee in a fair and just manner, what recourse does the employee have but to the Courts. Actions by administrative officials which are arbitrary and capricious and are rendered in bad faith render the resulting separation null and void and entitle the separated employee to appropriate relief. T. Michael Smith v. United States, supra; Knotts v. United States, 128 C.Cls. 489; Crocker v. United States, 130 C.Cls. 567, 575; Levy v. United States, 118 C.Cls. 106, 112; Gadsden v. United States, 111 C.Cls. 487, 489-490.

## IV. PLAINTIFF IS NOT GUILTY OF LACHES

In their answer, defendants have raised the defense of laches. That defense is not supported by the facts of this case. Plaintiff has

diligently pressed his claim for reinstatement at all times since his discharge, pursuing every avenue available to him, and at no time have defendants had justifiable cause to believe that plaintiff had abandoned his claim.

Laches, of course, is an equitable doctrine controlled by equitable considerations. As stated in Mount Vernon Sav. Bank v. Wardman, 84 App. D.C. 343, 173 F.2d 648, 649:

> "Laches is not only an equitable doctrine, but controlled by equitable considerations. Halstead v. Grinnan, 1894, 152 U.S. 412, 417 . . . . The fundamental requisite necessary for its application, is an undue and unexplained delay working an injustice to the other party. Abraham v. Ordway, 1895, 158 U.S. 416 . . . ."

Thus, an illegally discharged employee cannot sit on his rights for an indefinite period merely for the purpose of letting back pay accumulate while the District is paying a replacement to do the work he would be doing if reinstated. Where the Agency has hired a replacement for a discharged employee, "undue and unexplained delay" may work an injustice in that, if compensation is awarded the illegally discharged employee, the Agency will have to pay "two salaries . . . for a single service." Arant v. Lane, 249 U.S. 367, 372; Grasse v. Snyder, 89 App. D.C. 352, 192 F.2d 35, 37.

But the mere fact of delay is not enough to invoke the doctrine of laches. The delay must be "undue and unexplained." "The question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did." Townsend v. Vanderwerker, 160 U.S. 171, 186. Laches is applicable only if " . . . by reason of his delay the adverse party has good reason to believe the alleged rights are worthless, or have been abandoned." Galliher v. Cadwell, 145 U.S. 368, 372.

In Southern Pacific Co. v. Bogert, 250 U.S. 483, 488-489:

> "More than twenty-two years had thus elapsed since the wrong complained of was committed. But the essence of laches is not merely lapse of time. It is essential that there also be acquiescence in the alleged wrong or lack of diligence in seeking a remedy. Here plaintiffs, or others representing them, protested as soon as the terms of the reorganization agreement were announced; and ever since, they have with rare pertinency and undaunted by failure persisted in the diligent pursuit of a remedy."

That there must be a lack of diligence in seeking a remedy or acquiescence in the alleged wrong before laches is applicable has also been recognized in suits by discharged employees for reinstatement or compensation. See Arant v. Lane, supra at pp. 371, 372; Nicholas v. United States, 257 U.S. 71, 75-76; Norris v. United States, 257 U.S. 77, 80-81. In Myers v. United States, 272 U.S. 52, the plaintiff had been removed from his position as a postmaster on February 2, 1920 and did not file suit until April 21, 1921. The Court of Claims had dismissed the suit on grounds of laches, citing the Arant, Nicholas and Norris cases, supra. The Supreme Court rejected this holding, stating (272 U.S., at p. 107):

> "These cases show that when a United States officer is dismissed, whether in disregard of the law or from mistake as to the facts of his case, he must promptly take effective action to assert his rights. But we do not find that Myers failed in this regard. He was constant in his efforts at reinstatement . . . . Under these circumstances, we think his suit was not too late."

Myers had petitioned the President and a Senate Committee in his behalf, and had "protested to the Department against his removal, and continued to do so until the end of his term." 272 U.S., at p. 106.

Similarly, a number of other cases have held that laches had not occurred despite the elapse of a number of years between the discharge of the plaintiff and the filing of suit, where the plaintiff had

utilized the intervening period for a series of ineffectual efforts to obtain reinstatement. Baxter v. United States, 122 C.Cls. 632 (almost 6 years); Levy v. United States, 118 C.Cls. 106 (5 years and 8 months); Elchibegoff v. United States, 106 C.Cls. 541, 561; cf., Kaufman v. United States, 118 C.Cls. 91 (over 3 years).

Here it took plaintiff a few months to obtain counsel before filing in the Court of Claims on March 20, 1961. Defendant was immediately on notice that plaintiff was pressing his complaint. Plaintiff is not to be penalized because his attorney was of the opinion that the Court of Claims could give full and complete relief, including review of both the actions by District Officials as well as the Civil Service Commission. When the Court of Claims indicated it would not review the District's action, plaintiff promptly removed the suit to this Court (Exhibit 40). The only delay took place when defendant needed nearly 5 months to prepare its response. As this Court well knows, it takes the Office of the United States Attorney or the Department of Justice many months to receive the appropriate personnel files necessary for a reply in this type of case. Plaintiff, of course, is not chargeable with this delay.

Nor is plaintiff chargeable for any delay in seeking relief first in the Court of Claims. Where the delay is due to error of counsel in research, plaintiff is not deemed barred because of laches. Ritter v. Strauss, 261 F.2d 767, 772, 104 App. D.C. 301. Where a claimant, due to uncertainty in law brought suit against the wrong government officer, there is no laches. Williams v. Fanning, 332 U.S. 490.

In this case not only were defendants continually on notice [4] that there was no acquiescence, but plaintiff took other employment as early as June 27, 1958, and reached grade GS-12 in April 1962. His salary loss in the main occurred between March 10, 1958 and June 31,

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4/ Both the District government and the Commission made reports to the Department of Justice in the Court of Claims case.

1961 (Affidavit par. 34); so there can be no claim of prejudice due to payment of double salary beyond the period of administrative appeal and reasonable time to join issue in Court. Kaufman v. United States, 118 C.Cls. 91, 104.

Obviously, plaintiff is not to be penalized for the length of the administrative proceeding. Defendants knew at all times that plaintiff was claiming his removal was illegal. At no time did he sleep on his rights.

The language in Elchibegoff v. United States, 106 C.Cls. 541, 561 is applicable here:

> "The defendant raised the question of laches. However, it seems in going over the entire record that the plaintiff allowed no grass to grow under his feet. If there ever was a case in which a man was active in trying to secure his rights, the plaintiff was in this instance. He protested all over the lot. He wrote the Civil Service Commission, he wrote the Bureau of Economic Warfare; he wrote the president; he insisted on reinstatement; he filed a suit in the United States District Court and finally, after exhausting all other avenues of protecting his rights he filed a suit in the United States Court of Claims."

Here, as in the cases cited, the defense of laches should be rejected.

## CONCLUSION

For the reasons given above, plaintiff is entitled to the entry of summary judgment in his behalf with an appropriate order correcting his records to show continuity of service from the time of his wrongful separation on March 10, 1958, to the date of correction, including back salary for said period as if said separation had not taken place.

JOHN I. HEISE, JR.
Attorney for Plaintiff

[*Filed March* 13, 1964]

MOTION OF DEFENDANTS WALTER N. TOBRINER, JOHN B. DUNCAN AND F. J. CLARKE TO STRIKE PLEADINGS

Defendants Walter N. Tobriner, John B. Duncan and F. J. Clarke move the Court to strike from the pleadings filed by the plaintiff the following matter:

1. Paragraphs numbered 3, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 23 and 24 of plaintiff's affidavit in support of his motion for summary judgment. As grounds therefor the defendants say that the paragraphs enumerated above contained immaterial matter not found within the administrative record to be reviewed by the Court in this action.

2. Additionally, these defendants move the Court to strike the following numbered paragraphs from plaintiff's statement of facts filed pursuant to Local Rule 9(h):

Paragraphs numbered 2, 3, 5, 6, 7, 8, 9, 10, 11, 16, 17 and 18 for the reason that said matter is immaterial to the review of the administrative record by the Court and is not within the administrative record.

3. Defendants also move the Court to strike from the plaintiff's pleadings Exhibits numbered 5, 7, 8, 9, 10, 11, 24 and 25 for the reason that said documents represent matter that is immaterial to the issues and outside the administrative record.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANTS WALTER N. TOBRINER, JOHN B. DUNCAN AND F. J. CLARKE TO STRIKE PLEADINGS

Rule 12(f), Federal Rules of Civil Procedure.

Defendants say that the matter which they seek to have stricken from the pleadings filed by the plaintiff is both outside the administrative record and immaterial to the judicial review of that record which this Court is called upon to make.

[*Filed March* 13, 1964]

## CIVIL SERVICE COMMISSION DEFENDANTS' MOTION TO STRIKE MATTERS OUTSIDE THE ADMINISTRATIVE RECORD

Plaintiff has appended to his motion for summary judgment, now before this Court, his affidavit and several exhibits. The affidavit and plaintiff's exhibits numbered 5, 7, 8, 9, 10, 11, 24, 25, 38, 39, and 40 form no part of the agency's file and were not before the Civil Service Commission when this case was reviewed by that body. As matter de hors the administrative record, the affidavit and these exhibits are not properly before this Court and it would be error for this Court to receive or consider these materials.

The function of the courts in civil service cases is limited to determining whether the statutory and regulatory procedures were observed and whether the challenged action was arbitrary and capricious or was supported by evidence. Pelicone v. Hodges, _____ U.S. App. D.C. _____, 320 F.2d 754 (1963); Eustice v. Day, 114 U.S. App. D.C. 242, 314 F.2d 247 (1962). As the foregoing authorities indicate this determination must be made on the administrative record since the record forms the basis for the Commission's decision.

Plaintiff is not entitled to a trial de nove by the Court in a civil service case, Keim v. United States, 177 U.S. 290 (1900); Blackmon v. Lee, 92 U.S. App. D.C. 268, 205 F.2d 13 (1953), and accordingly, may not rely upon data outside the administrative record to create a genuine issue of fact or to support his motion for summary judgment. Wagner v. Higley, 98 U.S. App. D.C. 291, 235 F.2d 518 (1956). See also Ping v. Kennedy, 111 U.S. App. D.C. 106, 294 F.2d 735 (1961). When the administrative record shows the basis for the administrative decision, and no question is raised as to the decision having been made in good faith, it is error for the reviewing court to conduct a trial de novo or otherwise consider evidence going beyond the administrative record. Kessler v. Strecker, 307 U.S. 22, 34-35 (1939);

Shields v. Utah Idaho Central R.R. Co., 305 U.S. 177, 185, 187 (1938).

Moreover, plaintiff was afforded full opportunity to present any evidence in support of his allegations both when the case was before the Appeals Examining Office and again when it came before the Board of Appeals and Review. Consideration of additional evidence now by this Court would violate the doctrine of exhaustion of administrative remedies.

As the Supreme Court has declared: "A reviewing court usurps the Agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives ***[Agency] *** of an opportunity to consider the matter, make its ruling, and state the reasons for its action." Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 155 (1946). "Orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952). See Federal Power Commission v. Colorado Interstate Gas Company, 348 U.S. 492, 500 (1955); United States v. Capital Transit Co., 338 U.S. 286, 291 (1949).

Wherefore, it is respectfully submitted that plaintiff's affidavit and exhibits numbered 5, 7, 8, 9, 10, 11, 24, 25, 38, 39, and 40 be stricken.

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[*Filed March* 13, 1964]

## CIVIL SERVICE COMMISSION DEFENDANTS' OPPOSITION TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS PURSUANT TO RULE 9(h)

Come now defendants Macy, Lawton, and Hampton, the Civil Service Commission defendants, acting by and through their attorney, the United States Attorney, in opposition to plaintiff's statement of material facts pursuant to Local Rule 9(h).

In order to avoid the possibility of this Court assuming, pursuant

to the third paragraph of Local Rule 9(h), that defendants agree plaintiff's statement of facts contains material facts, the Court is respectfully informed as follows:

1. Plaintiff's statements of facts, paragraphs 5 through and including 11, relate to matters de hors the administrative record. Defendants do not admit these facts and no substantial evidence of the alleged facts was offered to the Civil Service Commission by plaintiff. Judicial review of a reduction in force case is limited to a review of the administrative record. Statements of fact relating to matters de hors the administrative record cannot be used to create a genuine issue of material fact for purposes of obtaining a trial de novo or to support a party's motion for summary judgment.

2. Plaintiff's statement of fact, paragraph 16, constitutes a conclusion of law and is therefore improper.

3. As stated above judicial review in this case is limited to the administrative record. The record reflects in both the opinions of the Appeals Examining Office and the Board of Appeals and Review that the reasons and justification for an internal reorganization were reviewed. (Ex. 17, 20). Statements in plaintiff's statement of facts, paragraphs 15 and 17, indicating that the Civil Service Commission refused to pass upon the propriety of the reduction are therefore inaccurate.

## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION OF DEFENDANTS TOBRINER, DUNCAN AND CLARKE TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

### I

### Background

This is an action against the individual members of the Board of Commissioners of the District of Columbia and the individual members of the United States Civil Service Commission. The complaint is for a permanent injunction requiring the restoration of plaintiff to his

former GS-12 position in the Department of Public Health, D.C., and for a declaratory judgment declaring plaintiff's status in the personnel records of the District of Columbia.

In essence, plaintiff alleged that at the time of his employment by the District of Columbia, he was a classified employee in the competitive service; that after transferring to the District service and while occupying a GS-12 position in the Department of Public Health, he was wrongly separated from that job by a reduction in force procedure; that he was not accorded the review procedures called for by regulations of the District of Columbia and that he was unlawfully denied the "retreat rights" to which he was entitled.

Defendants, Commissioners of the District of Columbia, in connection with their motion for summary judgment filed a statement of facts called for by Rule 9(h) of the Local Rules. The material facts not in dispute are as follows:

1. On January 30, 1953, plaintiff was appointed as a GS-9 Position Classifier in the Personnel Office of the Department of General Admission, D.C. (Plf's. Ex. 1)

2. On August 5, 1953, plaintiff was transferred from the Department of General Administration, D.C., to the Health Department, D.C., as a GS-11 Organization and Methods Examiner. (Plf's. Ex. 2)

3. On December 30, 1953, plaintiff was reassigned from a GS-11 Organization and Methods Examiner to GS-11 Position Classifier in the Department of Public Health. (Plf's. Ex. 3)

4. On June 23, 1954, plaintiff was upgraded from his GS-11 Position Classifier job to GS-12 Position Classifier within the Department of Public Health. (Plf's. Ex. 4)

5. At all times, while employed by the District of Columbia, plaintiff was employed in the excepted service. (  )

6. On February 6, 1958, plaintiff was informed by a letter signed by the Secretary, Board of Commissioners, D.C., that it had become necessary to separate him from his GS-12 Position Classifier job

under a reduction in force, for the reason that the position was abolished because of internal reorganization and realignment of duties and responsibilities within the Department of Public Health. The notice of separation was to become effective at the close of business March 10, 1958. (Plf's. Ex. 6)

7. On March 6, 1958, Board of Commissioners, D.C., approved the personnel recommendation of the Director of Public Health separating plaintiff from the District's service, separation to be effective March 10, 1958. ( )

8. At the time of plaintiff's separation by reduction in force he was alone on the retention register in his competitive level.( )

9. Thereafter, on several occasions plaintiff corresponded with the Secretary, Board of Commissioners, D.C., concerning his separation from the service and the rights to which he was entitled as a result of such separation. In each instance plaintiff was apprised of his rights, and the procedures to be accorded him were spelled out. ( )

10. After March 10, 1958, plaintiff appealed his separation to the United States Civil Service Commission. On May 13, 1958, the Civil Service Commission disposed of plaintiff's appeal in a letter containing findings of fact and conclusions. The Commission, through its Appeals Examining Office, found that plaintiff's claim that the reduction in force was not bona fide was not supported by any evidence; that the reduction in force was predicated upon a rational basis and was not taken in bad faith; that the Civil Service Regulations do not require agencies to grant "bumping rights" to employees in the excepted service; that the Civil Service Regulations do not require agencies to grant internal appeal rights in reduction in force actions; and that the reduction in force notice received by the plaintiff was proper and complete in all respects. ( )

11. After an appeal by the plaintiff from the decision of the Appeals Examining Office to the Board of Appeals and Review, United

States Civil Service Commission, the latter, on February 6, 1959, affirmed the findings and conclusion of the Appeals Examining Office. ( )

After the final decision of the United States Civil Service Commission, plaintiff pursued a number of courses of action in the District of Columbia Government, the United States Civil Service Commission and the United States Court of Claims. Finally, on or about April 23, 1962, plaintiff filed this complaint.

II

Pertinent Regulations

(a) Joint Regulations, paragraph 13.

(b) Civil Service Rules, 5 C.F.R., Section 01.2.

"§01.2 Extent of the competitive service.

"The competitive service shall include: (a) All civilian positions in the executive branch of the Government unless specifically excepted therefrom by or pursuant to statute or by the Civil Service Commission (hereafter referred to in this subchapter as the Commission) under §06.1 of this subchapter and (b) all positions in the legislative and judicial branches of the Federal Government and in the Government of the District of Columbia which are specifically made subject to the civil-service laws by statute. The Commission is authorized and directed to determine finally whether a position is in the competitive service."

(c) Civil Service Commission Retention Regulations, 5 C.F.R., Section 20.1 and Section 20.5(b)(c).

"PART 20 - RETENTION PREFERENCE REGULATIONS FOR USE IN REDUCTION IN FORCE

* * *

§20.1 Extent of part.

"The regulations in this part establish degrees of retention preference and uniform rules for reduction in force. They apply to all civilian employees in the executive branch of the Federal Government, in those parts of the Federal Government outside the executive branch which are subject by law to the competitive civil service requirements, and in the municipal government of the District of Columbia, except those whose appointments are required to be approved by the Senate and those who are appointed by the President of the United States.

"§20.5

* * *

"(b) Employees in positions in the competitive service. (1) No employee may be separated, furloughed for more than thirty (30) days, or reduced in pay or grade in a reduction in force while a competing employee with lower retention standing (and without retention priority based on a statutory retention right) is retained in the same competitive level.

"(2) No employee in any subgroup of tenure group I or II who is willing to accept a reasonable change in position may be separated, furloughed for more than thirty (30) days, or subjected to greater reduction in pay than necessary under such reasonable change in position, (i) if he is qualified for a position which will last as long as three (3) months in another competitive level in his present competitive area in which an employee with lower subgroup standing is retained, or (ii) if he is qualified to go back to a position which will last as long as three (3) months from which he was promoted (or to an essentially identical position in his present competitive area in which an employee with lower retention standing (and without retention priority based on a statutory retention right) is retained.

"(c) Employees in positions excepted from the competitive service. No employee in a position excepted from the competitive service may be separated, furloughed for more than thirty (30) days, or reduced in grade or pay in a reduction in force if a competing employee with lower retention standing is retained in the same competitive level."

(d) D.C. Personnel Manual, Chapter 15.

"1. SCOPE

"These procedures are established to assure an avenue of approach wherein an individual employee may seek adjustment of a personal complaint or grievance arising out of individual working conditions or job relations. Grievances or appeals resulting directly from reduction in force, demotion, position classification actions, policies, and administrative practices are covered elsewhere in Chapter 15."

III

The complaint should be dismissed - laches.

The undisputed facts show that plaintiff was separated from the District of Columbia service on March 10, 1958, through a reduction in force; that on February 6, 1959, the United States Civil Service Commission rendered its final decision in regard to plaintiff's appeal to it; and that on March 20, 1961, plaintiff filed an action in the United States Court of Claims which was voluntarily dismissed on March 16, 1962. The complaint was filed April 23, 1962. Thus, it appears that plaintiff delayed in bringing suit in the proper forum for a period of almost thirty-eight (38) months. This delay is sufficient to bar plaintiff's claim by laches. Jones v. Summerfield, 105 U.S. App. D.C. 140, 265 F.2d 124; Evans v. Leedom, 105 U.S. App. D.C. 141, 265 F.2d 125; Arant v. Lane, 249 U.S. 367.

Although plaintiff pursued a claim in the United States Court of Claims during the thirty-eight-month period of his delay in filing the instant suit, plaintiff voluntarily withdrew his claim from the Court

of Claims when it appeared that that Court would not consider all of the claims which he had asserted. This fruitless action on the part of plaintiff does not excuse his delay in bringing a suit in the proper forum. Evans v. Leedom, supra.

Accordingly, the complaint should be dismissed for the reason that plaintiff's claim is barred by laches.

IV

Plaintiff's employment in the excepted service.

There is no dispute of the fact that immediately prior to plaintiff's employment by the District of Columbia on August 5, 1953, he was a Federal employee in the "competitive service." There is also no dispute that immediately after his employment by the District of Columbia Plaintiff was an employee in the "excepted service."

At the outset it is important to note the distinction between the "competitive service" and the "excepted service" and to establish the rights to which an employee is entitled in the respective services.

It seems clear that Section 20.1 makes all of Part 20 of the Civil Service Commission Regulations applicable to the District of Columbia. Therefore, Section 20.5 of the Regulations is applicable to employees, such as plaintiff, in the excepted service. A study of Section 20.5 reveals that the Regulations distinguish between the two types of employees, that is, those in the "competitive service" and those in the "excepted service." It is important to note that in making these distinctions the Regulations provide that the respective services be treated differently. Section 20.5(b) of the Regulations have to do with positions in the "competitive service" and there provide that in a reduction in force, such an employee may not be separated, furloughed or reduced in pay when it appears that a competing employee with lower retention standing is retained in the same competitive level or where the employee is willing to accept a change in position to another competitive level or go back to a position from which he was promoted.

With respect to employees in the excepted service, Section 20.5 of the Regulations provides only one method of retaining a position in the event of reduction in force. It provides that no employee in a position excepted from the competitive service may be separated, furloughed or reduced in grade in a reduction in force if a competing employee in the same competitive level, but with retention standing, is retained.

Plaintiff, under the facts in this case, is clearly within Section 20.5(c) of these Regulations. He was the only employee in his competitive level and, therefore, is not entitled to retreat rights whereby he could request a change in position to another competitive level or retreat to a position from which he was promoted. Defendants' Exhibit  shows that plaintiff was alone on the retention register in his competitive level.

Plaintiff's Exhibit 30, the decision of the Appeals Examining Office of the Civil Service Commission, makes specific reference to plaintiff's standing in his competitive level. It says:

> "Basis 4 alleged that 'bumping rights' were arbitrarily withheld. As stated above, the Civil Service Regulations do not require agencies to offer reassignment to employees in the excepted service. Since it has not been shown that Mr. Pence has, in fact, any 'bumping rights' the contention is without merit." (Emphasis supplied)

Here the Civil Service Commission recognized the distinction made by its Regulations between those in the "competitive service" and those in the "excepted service." Further, the Commission makes a distinction between retreating to another position in the same competitive level and retreating to another position in another competitive level.

The Civil Service Commission again, the decision of its Board of Appeals and Review, gave recognition to the foregoing distinctions. The Board said:

> "It is noted that you challenge the correctness of the reference in the previous decision that Mr. Pence was in the excepted service. Whether or not he was in the excepted service, he was not entitled to an offer of position change upon being reached for action by reduction in force, inasmuch as there was no continuing competitive service position in his competitive area." (Emphasis supplied)

The short answer to plaintiff's claim that he was not accorded retreat rights to which he was entitled is that the Regulations do not grant any rights to an employee who is in the "excepted service" and alone in his competitive level when he is reached by reduction in force.

V

Reorganization and reduction in force

The administrative record shows that the Department of Public Health decided that the position of Chief Position Classifier was unnecessary and that its elimination would improve the efficiency of the Department. Thereafter, the plaintiff was given notice that it had become necessary to separate him from the service, because his position was unnecessary under the reorganization. This, in all respects, was a proper and adequate notice to the plaintiff and was so found by the Civil Service Commission. (See Plf's. Exhibits 30 and 33)

In plaintiff's appeal to the Civil Service Commission he claimed that the reorganization of the Health Department and the subsequent reduction in force was not a bona fide reorganization and requested the Commission to investigate the propriety of said reorganization. On this issue the Commission decided that no evidence was produced by Mr. Pence or his attorney to support the claim of impropriety in the reorganization and further, as appears in Exhibit 30 attached to plaintiff's motion, the Commission stated that it was the agency's

prerogative, in carrying out its responsibilities, to decide what positions were required. Further, the Commission concluded that it could not review or question the agency's decision in this regard. Inasmuch as plaintiff raised the issue of impropriety in reduction in force before the Civil Service Commission and had the claim of impropriety, decided adversely to him, he cannot now maintain an action that requires the Court to review de novo the reorganization and reduction in force. If the Commission's decision on this point is supported by substantial evidence, then the most that plaintiff can ask this Court to do is review the Commission's decision on the evidence before it.

VI

Plaintiff's appeal within the District of Columbia Government

Plaintiff contends that the District of Columbia failed to give him an appeal proceeding which was provided for in Chapter 15 of the District Personnel Manual and, therefore, failed to abide by its own Regulations. Plaintiff argues from this that the decision of the Commissioners of the District of Columbia is without legal effect and should be set aside. The fallacy in plaintiff's argument is that the District Personnel Manual and, in particular, Chapter 15 thereof, does not provide grievance procedures or appeals to those employees directly affected by reduction in force. Chapter 15 establishes grievance procedures for employees seeking adjustment of a personal complaint arising out of individual working conditions, but no provision was made for such procedures for grievances or appeals resulting from a reduction in force.

There is no statute or regulation which requires the District of Columbia to establish a grievance procedure for those affected by a reduction in force and, in fact, no such procedure has been established. Under the circumstances, it cannot be said that the District did not comply with its own Regulations. The truth is that there were no regulations, and none were required.

VII

Scope of Judicial Review

Upon consideration of the motions for summary judgment filed by the respective parties, the scope of judicial review is limited to a review of the administrative record. Eustace v. Day, 114 U.S. App. D.C. 242, 314 F.2d 247. There the Court established the rule when it stated:

> "[i]f there is a rational basis for the conclusions reached by the administrative agency and if all requirements of law are complied with, the Court may not step in and substitute its own judgment for that of the administrative agency."

A review of the administrative record in the instant case calls for the conclusion that the decision of defendants is adequately supported by that record, and the Court should not substitute its judgment for that of the agencies.

Conclusion

Based upon the foregoing, these defendants respectfully request the Court to grant them summary judgment.

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[*Filed March* 13, 1964]

MOTION OF DEFENDANTS WALTER N. TOBRINER, JOHN B. DUNCAN AND F. J. CLARKE TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON THE COMPLAINT

Defendants Walter N. Tobriner, John B. Duncan and F. J. Clarke move the Court to dismiss the complaint on the ground that it fails to state a claim against them upon which relief can be granted. The defendants say that the complaint fails to state a claim against them for the reason that the claims made therein are barred by laches.

Alternatively, these defendants move the Court for summary judgment in their favor on the ground that upon consideration of the pleadings filed herein, the undisputed facts set out in their statement of material facts not in dispute, the affidavit of Clyde C. Richardson, attached hereto and by reference made a part hereof, together with Exhibits numbered 1 through 6 attached thereto and the Personnel Regulations of the District of Columbia Government and the United States Civil Service Commission set out in the memorandum of points and authorities filed herein demonstrate that there is no genuine issue as to any material fact and that these defendants are entitled to judgment on the complaint as a matter of law.

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[Filed March 13, 1964]

STATEMENT OF MATERIAL FACTS
OF TOBRINER, DUNCAN AND CLARKE
AS TO WHICH THERE IS NO GENUINE ISSUE

1. On January 30, 1953, Plaintiff was appointed as a GS-9 Position Classifier in the Personnel Office of the Department of General Admission, D.C. (Plf's. Ex.1)

2. On August 5, 1953, plaintiff was transferred from the Department of General Administration, D.C., to the Health Department, D.C., as a GS-11 Organization and Methods Examiner. (Plf's. Ex. 2)

3. On December 30, 1953, plaintiff was reassigned from a GS-11 Organization and Methods Examiner to GS-11 Position Classifier in the Department of Public Health. (Plf's. Ex.3)

4. On June 23, 1954, plaintiff was upgraded from his GS-11 Position Classifier job to GS-12 Position Classifier within the Department of Public Health. (Plf's. Ex.4)

5. At all times, while employed by the District of Columbia, plaintiff was employed in the excepted service.

6. On February 6, 1958, plaintiff was informed by a letter signed by the Secretary, Board of Commissioners, D.C., that it had become necessary to separate him from his GS-12 Position Classifier job under a reduction in force, for the reason that the position was abolished because of internal reorganization and realignment of duties and responsibilities within the Department of Public Health. The notice of separation was to become effective at the close of business March 10, 1958. (Plf's. Ex.6)

7. On February 8, 1958, plaintiff in a letter to the Secretary, Board of Commissioners, D.C., inquired about his appeal rights within the D.C. Government.

8. On February 12, 1958, plaintiff in a letter from the Secretary, Board of Commissioners, D.C., was informed of his appeal rights within the D.C. Government and also about his time within which to appeal to the United States Civil Service Commission.

9. On March 4, 1958, plaintiff requested the D.C. Personnel Office to advise him of any and all positions for which he was qualified and in which he could exercise bumping rights in the Department of Public Health.

10. On March 5, 1958, plaintiff was advised by the Personnel Office that positions at the Department of Public Health were in the excepted service and that in such a situation he had no bumping rights to positions in other competitive levels.

11. At the time of plaintiff's separation by reduction in force he was alone on the retention register in his competitive level.

12. On March 24, 1958, the Civil Service Commission advised the District of Columbia that plaintiff had appealed from the reduction in force notice issued to him and requested the District of Columbia to furnish it certain information.

13. On March 31, 1958, the Personnel Officer for the District of Columbia replied to the letter from the Civil Service Commission and furnished all the information requested by the Commission.

14. Thereafter, on several occasions plaintiff corresponded with the Secretary, Board of Commissioners, D.C., concerning his separation from the service and the rights to which he was entitled as a result of such separation. In each instance plaintiff was apprised of his rights, and the procedures to be accorded him were spelled out.

15. After March 10, 1958, plaintiff appealed his separation to the United States Civil Service Commission. On May 13, 1958, the Civil Service Commission disposed of plaintiff's appeal in a letter containing findings of fact and conclusions. The Commission, through its Appeals Examining Office, found that plaintiff's claim that the reduction in force was not bona fide was not supported by any evidence, that the reduction in force was predicated upon a rational basis and was not taken in bad faith; that the Civil Service Regulations do not require agencies to grant "bumping rights" to employees in excepted service; that the Civil Service Regulations do not require agencies to grant internal appeal rights in reduction in force actions; and that the reduction in force notice received by the plaintiff was proper and complete in all respects.

16. After an appeal by the plaintiff from the decision of the Appeals Examining Office to the Board of Appeals and Review, United States Civil Service Commission, the latter, on February 6, 1959, affirmed the findings and conclusion of the Appeals Examining Office.

## AFFIDAVIT OF CLYDE C. RICHARDSON

I, Clyde C. Richardson, Deputy Chief, Administration and Safety Division, D.C. Personnel Office, having been first duly sworn, on oath, depose and say that the documents numbered 1 through 6 attached hereto relate to the reduction in force action in the case of

Andrew R. Pence and are true copies of official documents under my legal custody and control.

CLYDE C. RICHARDSON
Deputy Chief
Administration and Safety Division
D.C. Personnel Office

[Filed March 13, 1964]

## CIVIL SERVICE COMMISSION DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

The United States Civil Service Commission defendants through their attorney, the United States Attorney, respectfully move this Court for summary judgment in their favor on the ground that the certified copies of administrative records concerning plaintiff, which are attached hereto and made a part hereof, disclose that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

[Filed March 13, 1964]

## STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 9(h)

1. On February 6, 1958, plaintiff, a non-veteran, received a reduction in force notice separating him from his excepted service position of chief position classifier in the Department of Public Health, Government of the District of Columbia. His separation under the terms of the notice became effective on March 10, 1958.

2. The reduction in force notice states that the separation "results from your psotion being abolished because of an internal re-

organization and realignment of duties and responsibilities within the Department of Public Health."

3. By letter of February 17, 1958, plaintiff appealed his separation to the Appeals Examining Office of the United States Civil Service Commission. In his appeal plaintiff asserted: (1) the reorganization was not bona fide; (2) the agency denied him his reassignment or "bumping rights"; and (3) he was not afforded a hearing by the District of Columbia.

4. In upholding the action taken by the District of Columbia, the Appeals Examining Office in its opinion of May 13, 1958 noted plaintiff's allegations that the reorganization was not in good faith "were not supported by any evidence from you [plaintiff's attorney] or Mr. Pence." The opinion further states:

> "We found that the appellant reviewed the work of the other lower-graded classifiers and made recommendations to the Chief of Administrative Management. The agency decided that the review of the work of the lower-graded classifiers, including a consideration of their individual recommendations, could be better accomplished by direct contact with the Chief of Administrative Management. When this realignment of duties occurred, Mr. Pence's job became surplus***. We find no evidence that the agency action was taken in bad faith." (Ex. 17).

The Appeals Examining Office further found that as an employee serving in a position excepted from the competitive service, plaintiff was not entitled to reassignment or "bumping rights."

5. On May 21, 1958, plaintiff appealed his separation to the Board of Appeals and Review, United States Civil Service Commission asserting the same allegations.

6. On February 6, 1959, the Board of Appeals and Review upheld the decision of the Appeals Examining Office. The Board found that the record supported a finding that an internal reorganization and realignment of duties resulted in plaintiff's position being abolished.

Answering plaintiff's allegation that he was denied reassignment rights, the Board stated:

> "It is noted that you challenge the correctness of the reference in the previous decision that Mr. Pence was in the excepted service. Whether or not he was in the excepted service, he was not entitled to an offer of position change upon being reached for action by reduction in force, inasmuch as there was no continuing competitive-service position in his competitive area." (Ex. 20)

The Board did not pass on plaintiff's allegation that he did not receive a grievance appeal by the District of Columbia. Noting that this issue was beyond its jurisdiction, the Board referred this matter to the Government of the District of Columbia "for whatever action that agency considers appropriate."

7. No action was taken by the Government of the District of Columbia.

8. By letter of April 8, 1960, plaintiff asked the Commissioners of the United States Civil Service Commission to re-open the appeal for the purpose of considering the issue of plaintiff's right to a grievance appeal in connection with the reduction in force by the Government of the District of Columbia.

9. On April 25, 1960, the Civil Service Commission denied plaintiff's request to re-open the appeal. The Commission advised plaintiff that while subsequent to his appeal it had revised its policy and determined it would review the procedural regulations of an agency, the new policy as set forth in Departmental Circular No. 1019, issued September 18, 1959, specifically related only to appeals under consideration on that date or appeals filed thereafter.

10. Plaintiff instituted the present action in this Court on April 23, 1962.

[Filed April 7, 1964]

# CIVIL SERVICE COMMISSION DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

## Preliminary Statement

Plaintiff began his employment with the Federal Government in the War Department in 1941. He subsequently was employed in the Office of Price Stabilization and in 1953 he joined the Department of General Administration of the District of Columbia Government as a position classifier. In this same year he was transferred to the Department of Public Health in the District of Columbia.

In 1954, plaintiff was promoted to chief position classifier with the grade of GS-12. In this capacity he reviewed the work of other lower-graded classifiers and made recommendations to the Chief of Administrative Management. It became apparent to the District of Columbia Government that an intermediate level review of the work of other position classifiers was unnecessary. Accordingly, in 1958 an internal reorganization and realignment of duties and responsibilities was recommended with the result that the work and recommendations of the position classifiers in the Department of Public Health was reviewed directly by the Chief of Administrative Management. By notice issued on February 6, 1958, plaintiff's position as chief position classifier was abolished and he was separated by reduction in force.

Plaintiff appealed his separation to the Appeals Examining Office and the Board of Appeals and Review of the Civil Service Commission. Both reviewing bodies upheld the action taken by the District of Columbia.

In this action instituted in the District Court on April 23, 1962, plaintiff alleges as against the Civil Service Commission defendants: (1) the reduction in force was not bona fide; (2) the denial of his reassignment or "bumping" rights; and (3) the Commission's refusal to review his allegation that the District of Columbia had failed to comply with its own procedural regulations.

## Argument

### I. Plaintiff's Suit is Barred by Laches.

The Civil Service Commission Defendants adopt herein the argument as to laches set forth in the Memorandum of Points and Authorities in Support of Motion for Summary Judgment filed by the District of Columbia defendants.

### II. The Administrative Record Fully Supports the Reduction in Force Action.

Title 5 C.F.R. §20.2 provides for a reduction in force where "such actions are caused by lack of work, shortage of funds, reorganization, or exercise of regularity reassignment or reemployment rights." The Civil Service Commission found that plaintiff's position as Chief Classifier in the Department of Public Health, Government of the District of Columbia, was abolished as a result of a reorganization. This finding has ample support in the administrative record.

The function of the courts in reviewing civil service cases is a limited one. The courts have repeatedly held their function does not extend to a review of the merits or wisdom of agency personnel action, but is limited solely to a determination of whether there has been substantial compliance with statutory procedures and regulations. Hofflund v. Seaton, 105 U.S. App. D.C. 171, 265 F.2d 363 (1959); Hargett v. Summerfield, 100 U.S. App. D.C. 85, 243 F.2d 29 (1957), cert. denied, 355 U.S. 819; Boylan v. Quarles, 98 U.S. App. D.C. 337, 235 F.2d 834 (1956); Wagner v. Higley, 98 U.S. App. D.C. 291, 235 F.2d 518 (1956), cert. denied, 352 U.S. 936. The creation or abolition of Government jobs is a matter which plainly involves the exercise of discretion by supervisory officials charged with that responsibility. Cf. Adams v. Humphrey, 98 U.S. App. D.C. 40, 232 F.2d 40 (1955).

Even without regard to this well established doctrine of limited judicial review, the administrative record plainly shows that the findings of the Civil Service Commission have ample support. The record

discloses that plaintiff as Chief Classifier reviewed the work of other classifiers of lower grades and made recommendations to the Chief of Administrative Management. This review on an intermediate level was found to be unnecessary and accordingly resulted in the abolition of plaintiff's job. The agency decided that a review of the recommendations of the individual classifiers could best be accomplished by direct contact with the Chief of Administrative Management. (See Ex. 7, 12, 13). Moreover, the record shows that plaintiff as chief classifier had no authority to allocate positions and could take no final action on such matters. (Ex. 13, 7). His function was simply that of a reviewer on an intermediate level. As such, his duties amounted to a duplication of effort. The decision to abolish the position was, in the view of the District of Columbia, a sound administrative determination. (Ex. 7).

Recently, in Eustice v. Day, 114 U.S. App. D.C. 242, 314 F.2d 247 (1962), our Court of Appeals, adopting the language of this Court, enunciated the standard for reviewing agency action and the conclusions reached by the Civil Service Commission on review. The Court in that case said:

> "We agree with the District Judge that '[i]f there is a rational basis for the conclusions reached by the administrative agency and if all requirements of law are complied with, the Court may not step in and substitute its own judgment for that of the administrative agency.'" Id. at 242.

Justification for the reorganization or realignment of duties within the Department of Health appears in the record in the Statement of the Personnel Officer for the District of Columbia (Ex. 13), as well as in a letter by Commissioner Karrick (Ex. 7), whose views were adopted by the President of the Board of Commissioners for the District of Columbia, Robert McLaughlin (Ex. 12). Clearly, then, the record reflects a "rational basis for the conclusions" reached by the Civil Service Commission. Eustice v. Day, supra.

While plaintiff alleged before the Appeals Examining Office of the Commission that the reduction in force was a "sham and a pretext." (Ex. 9), he did not support his allegations with any evidence. This is apparent in the opinion of the Appeals Examining Office which states:

> "Bases 1, 2, 3, 5, 10, and 11 allege generally that the reduction in force action was not bona fide. We noted that these bases were not supported by any evidence from you [plaintiff's attorney] or Mr. Pence." (Ex. 17).

No evidence of any kind in support of these allegations was submitted to the Civil Service Commission by plaintiff until he filed his brief with the Board of Appeals and Review. At that time he appended to his brief a letter addressed to Congressman McMillan reflecting his views. This document, whatever its merit, represents the only support for plaintiff's assertions.[1/]

It is plain that the Commission chose to base its findings on the more substantial evidence in the record justifying the reorganization. There is then "a rational basis" for the Commission's findings and, "the Court may not step in and substitute its own judgment for that of the administrative agency." Eustice v. Day, supra.

III. Plaintiff was not Entitled to Reassignment or "Bumping Rights."

Plaintiff contends he was denied his reassignment or so-called "bumping rights" under the Civil Service regulations. We submit that

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1/ In an attempt at this late date to establish his allegation of sham, plaintiff has filed with the instant motion for summary judgment his affidavit and several exhibits. These matters are de hors the administrative records and the Court's attention is directed to defendants' Motion to Strike which has been filed with this memorandum in support of defendants' cross-motion for summary judgment. The Court's attention is also invited to defendants' Opposition to Plaintiff's Statement of Facts Pursuant to Local Rule 9(h) wherein opposition is interposed to statements of fact by plaintiff which are based upon these materials de hors the administrative record.

the Commission correctly held that plaintiff was not entitled to reassignment.

The rights of a Civil Service employee upon separation from his job are defined in 5 C.F.R. § 20.5. Specific rights under this regulation are described for employees in excepted service positions and for those in competitive service positions.

It is clear that plaintiff, as an employee in the District of Columbia's Department of Health was serving in an excepted position. Title 5 C.F.R. § 01.2 provides that the competitive service shall include only those positions in the Government of the District of Columbia which are specifically placed in the competitive service by statute. While Congress has enacted legislation placing a few branches of the District of Columbia and certain positions in the competitive service, it has not passed a statute placing the District's Department of Health, as such, or plaintiff's position in the competitive service. (See e.g. 3 D.C. Code 105; see also Ex. 24). Thus, plaintiff's position is in the excepted service. As an employee in an excepted service position, plaintiff was not entitled to any reassignment or "bumping right" under the regulations. 5 C.F.R. § 20.5. The only separation right conferred upon an excepted service employee is the right not to be released if there is another competing employee with lower retention standing in the same competitive level. 5 C.F.R. 20.5(d). Since plaintiff as the only chief position classifier was alone on the retention register for his competitive level, he could not exercise this right. (Ex. 2).

Even if it were assumed, as the opinion of the Board of Appeals and Review points out, that plaintiff was in the competitive service, he would not have been entitled to reassignment under the circumstances here. The reassignment or "bumping rights" of such employees are spelled out in 5 C.F.R. 20.5(b). Such rights are operative, however, only in the same competitive area and of course as against other employees in the same service. Since all employees in the

Department of Health (the competitive area), are in the excepted service plaintiff in an assumed competitive service position could not have exercised his reassignment rights because there were no other competitive-service positions in the competitive area. (Ex. 20).

Plaintiff rests his claim to reassignment solely on the ground of competitive status. He alleges that he achieved competitive status as a Federal employee and was not divested of this status by transferring into the employ of the District of Columbia. This contention is untenable. As pointed out previously, separation rights under a reduction in force are conditioned not only upon "status" but upon "service" as well. The two are different in civil service parlance. See Bailey v. Richardson, 86 U.S. App. D.C. 248, 255, 182 F.2d 46 (1950), affirmed by an equally divided court 341 U.S. 918. By its very definition in the regulations, "competitive status" means only "basic eligibility to be noncompetitively selected to fill a vacancy in a competitive position." 5 C.F.R. 1.102(g). Stated another way, it means that one may be transferred, reassigned or reinstated to a position in the competitive service without taking an examination.

"Competitive status" alone confers no other reassignment or "bumping" rights. These are derived from 5 C.F.R. § 20.5 and are conditioned upon "service." Moreover, as the definition of the term itself states, it is applicable only to the competitive service. Plaintiff cannot escape the fact that his present position is in the excepted service.

In summation, as an employee in the excepted service, plaintiff was not entitled to any right of reassignment. Even if it be assumed that plaintiff was in the competitive service, he would not have been able to exercise the reassignment right the regulations confer upon him under the circumstances here because his competitive area (the Department of Health) had no other continuing competitive-service positions. "Competitive status" alone confers no special rights in this respect and is applicable only to the competitive service.

We submit that the Roth case, upon which plaintiff relies is of no assistance to plaintiff. The case appears to be limited to a very narrow and unique set of facts. In that case, Roth was employed in the competitive service. His job was transferred from the competitive service to the excepted service by Executive Order. When he was subsequently removed from this job by a reduction in force, he claimed he was entitled to his separation rights as a competitive service employee. The Court sustained his contention pointing out the paradox that he was once in the competitive service and without leaving his desk or leaving that service voluntarily was now in the excepted service. The unique facts limit the application of the case. Here plaintiff left the Federal service where he had competitive service, accepted employment with the District of Columbia; has transferred to different branches within it; and, has accepted as a result of the transfers several grade raises and job promotions voluntarily. These circumstances render the Roth case distinguishable.

IV. The Commission's Refusal to Review the District of Columbia's Procedural Regulations Was Not Improper.

Plaintiff alleges he was denied the right to a grievance appeal by the District of Columbia. He contends that the Civil Service Commission's refusal to review the allegation that the District had not complied with its own procedural regulations was improper.

At the outset, it should be pointed out that there are no regulations governing employees of the District of Columbia requiring grievance appeals resulting from reductions in force. While the District Personnel Manual states:

> "These procedures are established to assure an avenue of approach wherein an individual employee may seek adjustment of a personal complaint or grievance arising out of individual working conditions or job relations. Grievances or appeals resulting directly from

> reduction in force, demotion, position classification actions, policies, and administrative practices are covered elsewhere in Chapter 15."

no regulations exist requiring grievance appeals and no procedures for such appeals were ever established either in Chapter 15 or elsewhere by the District of Columbia. The reference in the Personnel Manual merely expresses an intention that has never been acted upon.

The absence of a District regulation requiring grievance appeals in reductions in force renders plaintiff's contention with respect to the Commission moot. However, even assuming such regulation did exist, the Commission did not act improperly. The Commission is charged with the responsibility of enforcing its own regulations. At the time of plaintiff's appeal its policy, as set forth in Departmental Circular No. 990 (Ex. 25), was not to review an agency's procedural regulations since this was the responsibility of the agency and not the Commission. Subsequent to plaintiff's appeal, on September 18, 1959, the Commission changed its policy and determined it would review compliance with agency regulations. The policy was made effective "with respect to appeals under consideration on the date of this Circular or received on or after that date." See Departmental Circular No. 1019 (Ex. 26).

A decision by the Board of Appeals and Review in reduction in force cases is final. There is no further right of appeal. 5 C.F.R. § 20.9. At the time of the Board's decision there was no Commission regulation or policy requiring it to review agency procedures. Thus the Board's refusal to review plaintiff's allegation was not improper. Moreover, in view of the foregoing it cannot be said that the Commission abused its discretion in refusing plaintiff's request, which was made some 14 months after the Board's decision and 7 months after the change of policy, to reopen the case.

## CONCLUSION

For the reasons set forth herein, and others which may be apparent to the Court or may be set forth at the hearing on this motion, the Civil Service Commission defendants respectfully move this Court to grant summary judgment for them.

[Filed April 7, 1964]

## PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE MATTERS OUTSIDE THE ADMINISTRATIVE RECORD

The Motions to Strike filed by defendants are clearly out of order. Under the broad caption of matters outside the administrative record, defendants propose that certain exhibits, affidavit paragraphs and paragraphs in the Rule 9(h) statement be stricken.

The material falls into three general categories: (a) exhibits and statements in support of paragraphs 12 and 19 of the complaint alleging that the so-called reorganization was a guise to separate plaintiff; (b) exhibits and statements tracing plaintiff's transfer to the District of Columbia Government and the prejudice of Laguellion (Comp. Joint pars. 8-11); and (c) exhibits and statements in explanation of plaintiff's administrative protest and proceedings in the Court of Claims (Complaint par. 18).

The basic allegations were all in the Complaint, to which defendants responded by answer without filing a Rule 12(f) Motion and their Motions now come too late.

Moreover, the identical position was taken by defendants in opposition to Plaintiff's Motion for Production and Inspection, which position was overruled by the Court's allowance of the very material which is now filed here. Defendants are endeavoring to now raise the very same defense for a second time. In this they cannot succeed.

The Civil Service Appeals Examining Office refused to examine the alleged Reorganization itself stating (Pls. Ex. 29):

"The wisdom of the reduction in force is not, of course, reviewable by the Civil Service Commission."

The Board of Appeals and Review stated (Pls. Ex. 33):

"The agency's decision to abolish Mr. Pence's position is therefore not subject to question by the Commission."

The District of Columbia Government refused to consider the matter or grant any hearing whatsoever (Pls. Ex. 37).

From the foregoing, it is apparent that there has been no administrative consideration upon the question of the Reorganization itself, and in fact, consideration has been refused. Thus, there was no administrative record on the point. As a practical matter most of the material now before the Court could only be obtained via the discovery and production processes available in the Court alone. We submit no estoppel is to be applied against plaintiff simply because the agency refuses to consider his claim, and he cannot obtain the evidentiary support without Court assistance.

The material to support plaintiff's diligence and to contradict the defense of laches is, we submit, clearly admissible. Under defendants' theory, a plaintiff would be virtually precluded from responding to a defense of laches. Such a course of action cannot be justified.

The Court can and should review the entire history of what took place in both the D.C. Government and Civil Service Commission to test the propriety of the actions therein. Any material relevant to this judicial examination is proper.

Motions to strike are not favored. Barron & Holtzoff, Federal Practice and Procedure, Vol. 1A, p. 480. Striking a pleading is a drastic remedy and should be used sparingly by the Court. Brown & Williamson Tobacco Corp. v. United States, (CA 6th 1953), 201 F.2d 819, 822.

Evidential facts on which, when read with the complaint as a whole, give a full understanding thereof, need not be stricken. 2 Moore's Federal Practices, S12.21.

But here defendants seek to strike exhibits and affidavits on the authority of Rule 12(f) of the Federal Rules of Civil Procedure. The Rule states on its face that it is applicable to strike portions of "pleadings." It is not applicable to affidavits or exhibits. Ernst Seidelman Corporation v. Mollison (S.D. Ohio 1950) 10 F.R.D. 426, 427.

The Motions to Strike should be denied.

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[*Filed April* 7, 1964]

PLAINTIFF'S REPLY TO CROSS MOTIONS FOR SUMMARY JUDGMENT FILED BY CIVIL SERVICE COMMISSION AND DEFENDANTS TOBRINER, DUNCAN AND CLARKE

The Cross Motions filed by defendants herein raise several points which, although discussed in our memorandum in support of plaintiff's motion, can best be answered in this brief reply.

REPLY TO LACHES

In raising the defense of laches, defendants fail to demonstrate that there has been a lack of diligence on the part of plaintiff in seeking relief or any acquiescence in the wrongful separation. There has also been no showing of any prejudice to defendants. Absent these two requirements, the defense of laches must fall.

Defendants' have relied upon the cases of Jones v. Summerfield, 105 U.S. App. D.C. 140, 265 F2d 124 and Evans v. Leedom, 105 U.S. App. D.C. 141, 265 F2d 125, to support their defense of laches. Such reliance is misplaced. The reasoning in these cases is best expressed in the Court's language in Evans v. Leedom, 265 F2d at 127:

> "There is thus not a single indication that Evans followed up in any way his 'contemplation' of starting legal action, until the bringing of the present suit."

In the case of Jones, the Court found that at no time did Jones, a veteran, seek review under Section 14 of the Veterans Preference Act. In both Jones and Evans, there were lengthy periods of inactivity which were unexplained in the record. The record here shows that Mr. Pence "protested all over the lot" and "allowed no grass to grow under his feet" in exercising diligence.

The language in Duncan v. Summerfield, 102 U.S. App. D.C. 185, 251 F2d 896, is most appropriate, for there the Court of Appeals reaffirmed (251 F2d at 897):

> "In suits for reinstatement in government employment, as in equitable actions generally, laches has two elements, (1) unreasonable delay in prosecuting a claim, and (2) resulting prejudice."

The case of Gurley v. Wilson, 99 U.S. App. D.C. 336, 239 F2d 957, is cited by the Court in the Duncan case in support of the quoted material above. The Gurley facts are similar to the cause here, for Gurley first selected the District Court in California before coming to the District of Columbia. But, due to his financial condition, Gurley waited one year between the California dismissal and the filing in this court. Still this Court held he was "sufficiently diligent."

As we have pointed out so many times, the defense of laches is inapplicable here because:

(a) The District of Columbia Officials and the Department of Justice at all times were on notice that plaintiff was actively pursuing his claim and had never abandoned it, and any delay in resorting to this Court did not operate "to defendant's prejudice." Baxter v. United States, 122 C.Cls. 632, 634.

(b) Any claim of prejudice for salary payment due to the intervening Court of Claims proceeding is overcome by plaintiff's showing that he had obtained another position prior to the date suit was brought there and

had reached the grade from which he was wrongfully separated shortly before the suit was filed there - no monetary prejudice arose thereafter. Simon v. United States, 113 C.Cls. 182,200.

(c) No prejudice is claimed by reason of unavailable records or witnesses.

(d) The record shows plaintiff was always diligent and at all times acted under advice of counsel in selection of tribunal and pursuing his remedies.

Plaintiff's delay in filing here has been carefully explained. The choice by his counsel of the Court of Claims in an effort to obtain back salary should not prejudice this diligent plaintiff in this case where there is no showing whatsoever of any prejudice to defendants. Absent this vital link of prejudice, the defense of laches must fall.

## THE EXCEPTED SERVICE ARGUMENT

All parties agree that plaintiff was a classified Civil Service Employee, with both "status" and "classified position" while serving in the War Department and O.P.S. Just like Roth, (Roth v. Brownell), plaintiff was at no time noticed that his "status" or "position" rights were being withdrawn or changed by his transfer (See: Pl. Ex.1). There is nothing in the record to show that he was ever noticed of his removal from the "competitive" service and placement in the "excepted service."

The simple answer to defendants' contentions that plaintiff was removed from the competitive service when transferred to the District Government is found in the Court of Claims case of Sam Saltzman v. United States, C.Cls. No. 120-61, decided May 10, 1963. In that case the Court had before it the issue of whether the Atomic Energy Act gave the AEC the power to convert Saltzman's status from a classified position to an excepted one.

The Court of Claims held that the Atomic Energy Act definitely did not give the Commission authority to take out of the classified civil service employees already in it. The Court of Claims, in holding that Saltzman never lost his rights once he had acquired permanent competitive status and once he was in the "classified civil service" [1/] throughout, relied upon the Roth decision.

As we pointed out in our main brief, the D.C. Regulations of November 18, 1930 (Main brief p.3) require that "the principles of the Civil Service Act and rules" are to apply in making appointments to the Government of the District of Columbia. Once "Classified Civil Service status" (both as to person and position) is obtained, it is retained regardless of transfer to the D.C. Government (Reg. Par.13, Main Brief p.3). Any removal from the "competitive" service or appointment in the "excepted" service requires a specific personnel action so indicating. Defendants have failed to produce any document, any regulation, or any memorandum which shows that plaintiff was ever divested of his place in the competitive service. There is none. Thus, the provisions of 5 CFR 20.5(b)(2) apply and the guarantees thereunder must be followed.

## THE ADMINISTRATIVE REVIEW

All defendants rely heavily upon the language of Eustice v. Day, 114 U.S. App. D.C. 242, 314 F2d 247 in support of their contention that this Court cannot examine what went on in the District of Columbia Government when the finger was pointed at plaintiff as the only one separated in the so-called reorganization process. Defendants say that because the District Officials have said all was in order, that this makes it an accomplished fact. Such an attempt by defendants to hide the truth cannot be tolerated.

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1/ It is clear that to be in the "classified Civil Service" you must have both "status" and "position". See: Bailey v. Richardson, 86 U.S. App. D.C. 248, 182 F2d 46.

Not only was no "rational basis" shown for separating plaintiff, but the record shows that in the face of an extra heavy workload in the position classification section of the Department of Health, District Officials hired and promoted additional classifiers and then at the same time separated plaintiff as excessive. The rationality of such action escapes us.

When plaintiff sought to review this improvident action, the Civil Service Commission chose, not once, but twice (Pl. Exs. 29 and 33) to refuse to examine the matter.

When plaintiff went back to the D. C. Government, it chose to ignore him entirely.

Defendants Tobriner, Duncan, and Clarke, argue in their brief pps. 9-10, that since the Civil Service Commission felt it could not review the D.C. Government's decision on reorganization, that this Court cannot do so. We fail to follow this reasoning in light of a record which shows that all administrative sources have refused to consider or pass upon the issue. We suggest there can be no administrative finality if there has been no administrative ruling whatsoever on the question.

## REFUSAL TO GRANT THE GRIEVANCE APPEAL

Defendants contend that although the District Government stated in Chapter 15 of its Personnel Manual that it had established a grievance procedure to cover appeals resulting from reductions in force (the identical case here) "elsewhere in Chapter 15" but then neglects to spell out such procedures elsewhere, that the District is excused.

The obvious answer to such contention is that when an agency notices employees by express regulation that an avenue of approach to appeal a reduction in force does exist, it must grant such an appeal despite its own failure to complete its Personnel Manual by setting forth the particular details of the appellate process.

The District Government cannot be allowed to profit by its own neglect and then hide behind its own misrepresentation and omissions

to the detriment of plaintiff, who was clearly entitled to the right of an appeal as announced in Chapter 15, "Grievances and Appeals."

Moreover, plaintiff specifically sought to appeal the inadequacies of his job relationship in the District Government through a grievance appeal in that area in which some precedence had been established, and here too he was rejected (Pls. Ex. 22423). Such refusal to follow regulations cannot be tolerated.

The defense that the Civil Service Commission was justified in not reviewing the omission by the D.C. Government because of its own misinterpretation [2/] of the case of Watson v. United States, 162 F. Supp. 755, is similarly without merit. If the wrong existed, the Commission should have reviewed it when it was presented. A defense of change in policy cannot stand.

## CONCLUSION

For the reasons set forth above and in our main brief, plaintiff is entitled to summary judgment.

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[Filed November 17, 1964]

## ORDER

Upon consideration of the motions for summary judgment filed herein by the plaintiff, the defendants Tobriner, Duncan and Clarke, members of the Board of Commissioners, D.C., and defendants Macy, Lawton and Hampton, members, United States Civil Service Commission, the motions of the defendants Tobriner, Duncan and Clarke to strike pleadings, as well as the motions of the defendants Macy, Lawton and Hampton to strike matters outside the administrative record and the opposition of these defendants to plaintiff's statement

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2/ See, Exs. 25 and 26 attached to motion of Civil Service Commission.

of material facts pursuant to Rule 9(h) and upon consideration of the administrative record before this Court, the Court finds that the following facts are adequately supported by the administrative record:

1. Prior to January 30, 1953, plaintiff was employed by the Office of Price Stabilization as a classified Civil Service employee.

2. On January 30, 1953, plaintiff was appointed as a GS-9 Position Classifier in the Personnel Office of the Department of General Administration, D.C.

3. On August 5, 1953, plaintiff was transferred from the Department of General Administration, D.C., to the Health Department, D.C., as a GS-11 Organization and Methods Examiner.

4. On December 30, 1953, plaintiff was reassigned from a GS-11 Organization and Methods Examiner to GS-11 Position Classifier in the Department of Public Health.

5. On June 23, 1954, plaintiff was upgraded from his GS-11 Position Classifier job to GS-12 Position Classifier within the Department of Public Health. At this grade, plaintiff became Chief Position Classifier, and his function was to review the work of other lower graded classifiers.

6. At all times, while employed by the District of Columbia, plaintiff was employed in the excepted service.

7. On February 6, 1958, plaintiff was informed by a letter signed by the Secretary, Board of Commissioners, D.C., that it had become necessary to separate him from his GS-12 Position Classifier job under a reduction in force, for the reason that the position was abolished because of internal reorganization and realignment of duties and responsibilities within the Department of Public Health. The notice of separation was to become effective at the close of business March 10, 1958.

8. On February 8, 1958, plaintiff in a letter to the Secretary, Board of Commissioners, D.C., inquired about his appeal rights within the D.C. Government.

9. On February 12, 1958, plaintiff, in a letter from the Secretary, Board of Commissioners, D.C., was informed that there were no appeal rights within the D.C. Government and also about his time within which to appeal to the United States Civil Service Commission.

10. On March 4, 1958, plaintiff requested the D.C. Personnel Office to advise him of any and all positions for which he was qualified and in which he could exercise "bumping rights" in the Department of Public Health.

11. On March 5, 1958, plaintiff was advised by the Personnel Office that positions at the Department of Public Health were in the excepted service and that in such a situation he had no reassignment or "bumping rights" to positions in other competitive levels.

12. At the time of plaintiff's separation by reduction in force, he was alone on the retention register in his competitive level.

13. By letter dated February 17, 1958, plaintiff appealed his separation to the United States Civil Service Commission.

14. On March 24, 1958, the Civil Service Commission advised the District of Columbia that plaintiff had appealed from the reduction in force notice issued to him and requested the District of Columbia to furnish it information relating to the reduction in force, which terminated plaintiff's employment.

15. On March 31, 1958, the Personnel Officer for the District of Columbia replied to the letter from the Civil Service Commission and furnished all the information requested by the Commission.

16. On May 13, 1958, the Civil Service Commission ruled on plaintiff's appeal in a letter containing findings of fact and concluded that plaintiff's rights under the Retention Preference Regulations were not violated. More specifically the Commission, through its Appeals Examining Office, found that plaintiff's claim that the reduction in force was not bona fide was not supported by any evidence; that the reduction in force was bona fide and predicated upon a rational basis and was not taken in bad faith; that the Civil Service Regula-

tions do not require agencies to grant reassignment rights to employees in the excepted service; that the Civil Service Regulations do not require agencies to grant internal appeal rights in reduction in force actions; and that the reduction in force notice received by the plaintiff was proper and complete in all respects.

17. After an appeal by the plaintiff from the decision of the Appeals Examining Office to the Board of Appeals and Review, United States Civil Service Commission, the latter, on February 6, 1959, affirmed the findings and conclusion of the Appeals Examining Office.

18. Upon review of the administrative record filed herein and the applicable statutes and regulations, this Court further finds that:

a. The District of Columbia had promulgated no regulations providing for an appeal to the District of Columbia by an employee directly affected by a reduction in force.

b. Plaintiff was accorded all of the statutory and regulatory rights to which he was entitled.

c. As an employee in the excepted service, plaintiff was not entitled to reassignment or "bumping rights."

d. The reduction in force was bona fide and is supported by substantial evidence.

19. The following exhibits filed by plaintiff do not constitute matters which were placed before the Civil Service Commission:

a. Exhibit numbered 1 (plaintiff's affidavit).

b. Plaintiff's exhibits numbered 5, 7, 8, 9, 10,11, 24, 25, 38, 39, and 40. Since plaintiff failed to exhaust his administrative remedy with respect to these exhibits by presenting them to the Civil Service Commission, they are not properly before this Court and, therefore, they are entitled to no consideration.

20. The following alleged facts in plaintiff's statement of facts under Rule 9(h) are not supported by the administrative record:

a. Paragraphs numbered 2, 3, 5, 6, 7, 8, 9, 10, 11, 16, 17, and 18.

WHEREFORE, it is, by the Court, this 16th day of November, 1964,

ORDERED: That the motions of the defendants to strike be, and they are, hereby granted, and the opposition of the defendants Macy, Lawton and Hampton to plaintiff's statement of material facts be, and it is hereby sustained, and it is

FURTHER ORDERED: That plaintiff's exhibits numbered 1, 5 through 11, 24, 35 and 38 through 40 be, and they are hereby stricken as evidence before this Court on plaintiff's motion for summary judgment, and it is

FURTHER ORDERED: That paragraphs numbered 2, 3, 5 through 11 and 16 through 18 of plaintiff's statement of facts under Rule 9(h) be, and they are, hereby stricken, and it is

FURTHER ORDERED: That plaintiff's motion for summary judgment be, and it is, hereby denied; defendants' motions for summary judgment be, and they are, hereby granted, and the complaint as to all defendants be, and it is, hereby dismissed.

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[Filed December 16, 1964]

## NOTICE OF APPEAL

Notice is hereby given this 16th day of December, 1964, that Andrew R. Pence, Plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 17th day of November, 1964, in favor of defendants, Tobriner, Duncan, Clarke, Macy, Lawton, and Hampton against said plaintiff, Andrew R. Pence.

BRIEF FOR APPELLANT

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19136



ANDREW R. PENCE,
*Appellant,*

v.

WALTER N. TOBRINER, *et al.*
*Appellees*

*Appeal From the United States District Court*
*for the District of Columbia*

JOHN I. HEISE, JR.
919-18th Street, N. W.
Washington, D. C.
*Attorney for Appellant*

## QUESTIONS PRESENTED

1. Was Appellant entitled to a Grievance Appeal under the procedures set forth in the District of Columbia Personnel Manual on the basis of his allegations of reprisal and illegality of separation?
2. Can the District officials use their failure to provide regulations, when the Personnel Manual advises that such regulations governing Grievance Appeals resulting from reductions in force are provided elsewhere, as a basis for denying a Grievance Appeal to Appellant?
3. Was Appellant properly divested of his Classified Civil Service Status, thereby precluding his entitlement to "Retreat" or "Reassignment" rights in an announced reduction in force?
4. Was Appellant's separation arbitrary and capricious?
5. Were Appellant's exhibits filed in and statements made in the suit below properly excluded under Rule 12(f), Federal Rules of Civil Procedure?

## *INDEX*



### TABLE OF CASES

MISCELLANEOUS



STATUTES CITED



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* *Cases chiefly relied upon are marked by asterisks.*

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19131

ANDREW R. PENCE,
*Appellant,*

v.

WALTER N. TOBRINER, *et al.*
*Appellees*

*Appeal From the United States District Court for the District of Columbia*

## BRIEF FOR APPELLANT

### JURISDICTIONAL STATEMENT

The complaint filed in the District Court seeks a permanent injunction and declaratory relief fixing and determining Appellant's right to employment in the Department of Public Health of the District

of Columbia (J.A. 1). The Court below had jurisdiction under the provisions of Sections 1331, 1332 and 2201 of Title 28 U.S.C. This appeal is from an order denying Appellant's motion for summary judgment and granting defendants' motions (J.A. 79) which is reviewable by this Court by virtue of Title 28, U.S.C., Section 1291.

## STATEMENT OF CASE

### 1. Proceedings Below.

This is an appeal from a final order entered in the United States District Court for the District of Columbia, denying Appellant's (plaintiff below) motion for summary judgment and granting the motions for summary judgment filed by the Appellees, Commissioners of the District of Columbia and Commissioners of the United States Civil Service Commission. Judgment was entered under an order by the Honorable Leonard P. Walsh, presiding judge.

### 2. Appellant's Appointment, Transfer and Service.

Appellant first entered Federal Government service on April 1, 1941, with the War Department in Washington, D. C., and on October 1, 1941, received classified Civil Service Status (J.A. 20).

By notice dated January 30, 1953, appellant was transferred to the position of Position Classifier, GS-9, in the Department of General Administration of the Government of the District of Columbia from the position of Position Classifier in the Office of Price Stabilization (Special J.A. A-1).[1]

By transfer and promotion, Appellant reached Grade GS-12 Position Classifier position in the Division of Administrative Management

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[1] Pursuant to this Court's order, exhibit material filed below is bound in a Special Joint Appendix which is not printed but is filed in triplicate. The designation "Special JA" will be used to refer to this material.

on July 9, 1954 (Spec. J.A. A-2, A-3, A-4). In 1955 friction developed between Appellant and his supervisor, the Chief of Administrative Management, over a series of incidents involving classification practices and charitable solicitation (J.A. 21-23).

The feeling between the supervisor and Appellant increased until April 12, 1957, when the supervisor in giving Appellant a satisfactory performance rating, also issued a memorandum containing criticisms of Appellant which were vague and general and lacked specificity. Appellant then took several administrative actions to secure an explanation of the criticisms, which culminated in a grievance proceeding (J.A. 22).

The grievance proceedings established that this supervisor, in his capacity as the administrator of grievance procedure for the Department, had failed to comply with an order of the District of Columbia Commissioners by not establishing a grievance procedure for the Department. Compliance was effected immediately, and after some delay, a hearing took place. In November 1957, a decision was handed down by the Grievance Committee in Appellant's favor (Special J.A. A-5).

This grievance proceeding and ruling in favor of Appellant caused embarrassment and resentment on the part of Appellant's supervisor in view of his official responsibilities, and served to add to the heavy air of unrest and friction between this supervisor and Appellant (J.A. 22-23).

While these grievance proceedings were taking place, the classification workload for the Department had greatly increased due to Civil Service Commission demands. A reorganization plan was approved providing for additional classifier positions (Grade GS-11 and below). A request for an additional classifier for the staff was initiated on February 5, 1958, and approval and appointment followed on February 6, 1958 (Special J.A. A-10). The new classifier took the oath on February 10, 1958 (Special J.A. A-11).

**3. Separation Proceedings Against Appellant and Appeals.**

On the same day of this action appointing another classifier, February 6, 1958, Appellant was issued a notice of proposed separation by reduction in force, effective March 10, 1958 (Special J.A. A-6). A few months thereafter the new position classifier was promoted to the classifier grade GS-11 position which had originally been provided for in the approved reorganization plan (Special J.A. A-11).

Appellant made a timely response to the Board of Commissioners of the District of Columbia on February 24, 1958, and contended among other things that the proposed action was not bona fide but rather a retaliation by his supervisor (Special J.A. A-16). Appellant specifically requested that as an employee with classified status he be accorded his full "bumping" rights (Special J.A. A-17), but he was denied these rights on the ground that they did not apply to him by reason of his excepted appointment (Special J.A. A-18). He was listed all alone on the register competing only with himself (Special J.A. A-19).

Appellant specially requested on March 7, 1958, that he be accorded a grievance appeal and hearing because his separation was not a bona fide reduction in force but a reprisal action against him alone (Special J.A. A-20), but his request was denied (Special J.A. A-21). Appellant also appealed his separation to the Civil Service Commission (Special J.A. A-26). The Commission refused to grant a hearing and decided that it could not review the propriety of the Reduction in Force (Special J.A. A-29, A-30, A-31).

The Commission's Bureau of Departmental Operations and Board of Appeals and Review decided that plaintiff was not entitled to an offer of reassignment or bumping rights on the ground he was serving in an excepted position at the time of separation (Special J.A. A-30, A-33).

When the Commission refused to investigate and pass upon the propriety of the reduction and failed to rule on the issue of the Gov-

ernment of the District of Columbia refusing to follow its own regulations, Appellant on March 16, 1959, again sought relief from the District Commissioners (Special J.A. A-34). The District Commissioners ignored this request. Appellant also sought further review by Civil Service Commission without success (Special J.A. A-36, A-37).

On June 27, 1958, Appellant was employed by the Library of Congress and on April 15, 1962, again reached the grade of GS-12 in the Commerce Department (J.A. 26). On April 23, 1962, Appellant filed his complaint in the United States District Court for the District of Columbia (J.A. 1), after withdrawing his petition filed in the United States Court of Claims (Special J.A. A-39, A-40). Appellees' motions for summary judgment and motion to strike were granted November 16, 1964 (J.A. 83).

## STATUTES, REGULATIONS AND RULES INVOLVED

Statutes, Regulations and Rules involved are set forth in Appendix hereto.

## STATEMENT OF POINTS

In denying appellant's motion and granting judgment in favor of appellees, the Court below erred as follows:

1. In failing to find that appellant's separation from the Department of Public Health of the District of Columbia on March 10, 1958, was effected in violation of the procedural guarantees of the District Personnel Manual in that appellant was denied the right of a Grievance Appeal, including the right to a hearing and the right to present witnesses, etc.

2. In failing to find that the District Commissioner appellees denied appellant the right to full administrative review of his separation by failing to accord him a full grievance appeal from the alleged reduction in force.

3. In failing to find that appellant was never properly divested of his classified Civil Service Status, and by reason of the retention of such status, he was improperly refused Retreat and/or Reassignment Rights in the District's announced reduction in force.

4. In failing to hold that appellee's actions in separating appellant were arbitrary and capricious in illegally using an abolition of position as a guise to effect appellant's separation in retaliation against him.

5. In upholding appellees' Motions to Strike Statements and Exhibits when such exhibits and statements were applicable to the issue of laches raised below, and which evidence was unobtainable without discovery proceedings below, and by reason of limited review afforded in administrative proceedings.

## SUMMARY OF ARGUMENT

In deciding the motions below in favor of appellees, the District Court has held, in effect, that appellant was not denied any procedural rights in the removal process initiated by District of Columbia Officials and reviewed by the Civil Service Commission. The record, however, is replete with omissions in the procedural regulations validly prescribed by the Board of Commissioners of the District of Columbia and the regulations issued by the Civil Service Commission.

Though he so specifically requested, appellant was denied the right of grievance appeal, including right of a hearing and the presentation of witnesses. Such appeal was plainly guaranteed under the District's own regulations when appellant sought adjustment of his grievance arising out of job relations with his superiors.

Moreover, the record demonstrates that an appeal by appellant to District officials on the basis of a separation resulting from a reduction in force was refused on the ground that specific procedures, though specifically having been announced in the District Personnel Manual as having been promulgated, were not reduced to writing and thus unavailable to appellant. These procedural omissions void the entire removal process and demand appellant's retroactive restoration to duty.

The record establishes that an attempt was made to separate appellant in March 1958 from a position in the "Excepted" service, but there is no evidence to establish that appellant was ever removed from the "Classified" service. Failing to establish such removal, appellees were required to accord appellant full retreat and/or reassignment rights as a Classified Civil Service employee noticed for separation under a reduction in force.

We also show that the announced method selected for appellant's removal was not the true reason for his separation. Rather appellant was separated as a result of the arbitrary and capricious action of certain District Officials to retaliate against appellant because of his previous success in a grievance appeal.

Finally, we demonstrate that the grant of Appellees' Motion to Strike under Rule 12(h) of the Federal Rules of Civil Procedure was improper when the exhibit material and statements were necessary to contradict the allegation of laches and to establish the errors in the separation process when the District of Columbia Authorities refused to permit such evidence by denying an administrative hearing.

## ARGUMENT

### I. Appellees in Denying Appellant a Grievance Appeal Failed To Comply With Their Own Regulations

#### A. *Appellant's Entitlement to a Grievance Appeal*

Following his initial requests to be apprised of "any rights of appeal" to which he was entitled (Special J.A. A-12) and following the erroneous advice by appellees that "there are no administrative procedures" available (Special J.A. A-13), appellant specifically requested, in timely manner, the right of a grievance appeal (Special J.A. A-16, A-20). He forcefully contended that the separation was based on "bias and prejudice on the part of" his supervisor and was a "reprisal" action (Special J.A. A-20). The specific reasons for these conclusions were placed before the District of Columbia Board of Commissioners (Special J.A. A-16).

The very language of Chapter 15 of the District Personnel Manual[2] assures the individual employee of an avenue of approach to "seek adjustment of a personal complaint" arising out of job relations. Appellant had a grievance against his superior. This superior, in concert with other officials, was manipulating appellant's position into a category arbitrarily marked surplus, and then abolishing the position to get rid of appellant in retaliation for appellant's success in a previous grievance proceeding. Appellant sought to bring the entire matter out in the open through his established right to a grievance appeal. It would be difficult to imagine any contention of employee-employer relationship more justifiable for reconciliation by grievance procedures.

Appellant had the right to file a grievance within one month after being noticed for separation,[3] to have witnesses appear and testify in

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[2] Quoted at page 22, *infra*, in applicable part.

[3] District Personnel Manual 15A-6a.

his behalf (15A-6c), to have a record made of the appeal (15A-6f), and to a decision (15A-6h). Provision was also made for further appeal, if necessary.[4]

Such procedure would have enabled appellant to establish that the Classification workload had greatly increased (Special J.A. A-7) with a resulting need for additional classifiers, who were hired (Special J.A. A-10). He would have established, not only the obvious necessity for his retention, but equally important, the fact that his supervisor had set up an alleged reduction or reorganization in which he was the only person being separated in retaliation for previous clashes between the two. This was certainly not in the Government's best interest. That such retaliatory schemes should not be tolerated goes without saying. And, the minimum which appellant sought was the opportunity to prove his contentions. This was and is a basic right.

But both the District Officials and the Civil Service Commission arbitrarily denied appellant the right to present these matters in appropriate administrative proceedings. And now appellees argue that since appellant did not present this evidence administratively, the doors of a judicial forum are also closed to him and to his proof. This attempt by appellees to pull themselves up by their own irregularities and capricious denials cannot be condoned. Appellant is entitled to his day in an administrative grievance proceeding. The District's own regulations so provide. They must be followed.

For it is now firmly established that when a Government official or agency lawfully prescribes rules of procedure, these are binding upon the Government as well as the citizens. *Accardi v. Shaughnessy*,

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[4] Chapter 15 of the Personnel Manual makes provision for further appeal to the District's Central Grievance Committee. Whether such appeal procedure should have been substituted here in lieu of any departmental appeal is of slight significance in view of the fact that either step provides for hearing and decision — which was denied appellant here.

347 U.S. 260, 267; *Bridges v. Wixon*, 326 U.S. 135, 153; *Chapman v. Sheridan-Wyoming Co.*, 338 U.S. 621; *Bilokumsky v. Tod*, 263 U.S. 149, 155. The rule applies even where the administrative action under review is discretionary in nature. *Coleman v. Brucker*, 103 App. D.C. 283, 257 F.2d 661, 662; *Accardi v. Shaughnessy, supra*. A personnel action against an employee can never stand when the Government officials charged with carrying out the procedures have departed from their own regulations in attempting to effect a removal. *Service v. Dulles*, 354 U.S. 363; *Vitarelli v. Seaton*, 359 U.S. 535; *Watson v. United States*, 355 U.S. 14. In failing to accord appellant the right to the grievance appeal which he sought and to which he was entitled, appellees erred.

### *B. Grievance Appeal Resulting From Reduction in Force*

As we have pointed out above, appellant's contention of wrong-doing centered about the personal animosity demonstrated by his superior against him which demanded adjustment via a grievance proceeding. District officials couched the removal in terms of a reduction in force in order to circumvent any confrontation by appellant in a hearing or review proceeding. They went on to say appellant had no right to administrative review before District Officials (Special J.A. A-13). Then the Civil Service Commission proceeded to also deny appellant a hearing (Special J.A. A-29) though one was specifically sought by him (Special J.A. A-27). Now appellees have the effrontery to contend that appellant failed to raise the questions of prejudice, conspiracy, retaliation and impropriety of the reorganization administratively.[5]

We have contended throughout these proceedings that the alleged reduction in force was not bona fide, but designed to "get" appellant

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[5] See in this regard the Civil Service Appeal (Special J.A. A-27) and (Special J.A. A-32) and initial appeal to D. C. Board of Commissioners (Special J.A. A-16 and A-20).

alone — especially, where as here, he was the only one involved and all alone in the retention register (Special J.A. A-19). We have also pointed out that this was an artful scheme to attempt to circumvent any review of the merits of the separation and thereby afford only a "lick and promise" review which never ever would look directly at the root of the matter. Thus far appellees have succeeded. We trust that here this vacuum-type abuse of employee due process will be brought to a screeching halt.

The District of Columbia Board of Commissioners ordered a Grievance Procedure established for all, each and every District department. The Personnel Manual provides that:

> "Grievances or appeals resulting directly from reduction in force, * * * are covered elsewhere in Chapter 15" (emphasis added). (See p. 22).

This does not say "will be," but "are." This is a statement of guarantee. This announces to each and every District of Columbia employee that he has a right of appeal of even a legitimate reduction in force (which we emphatically contend this was not). But the District Officials, either carelessly or by design, neglected to set forth the specifics of this review procedure "elsewhere" in Chapter 15; so now they are contending their entitlement to profit by their own neglect, and go on to state that there are "no administrative procedures providing for such appeals in cases of reduction-in-force" (Special J.A. A-21). On one hand they announced an appeal by procedures set forth elsewhere in the Manual. On the other hand they defend, we didn't get around to publishing this other section, so you are entitled to nothing. And, so they say, we misled you to our benefit. You have no recourse.

We submit that when appellees state there "are" procedures for an administrative appeal, they must set them forth or, at the very minimum, afford an appeal under appeal procedures existing for similar actions — in this case, a grievance appeal applicable to removals.

This failure of District Commissioners to follow their own unequivocal procedural direction constitutes reversible error and appellant's separation must be set aside. *Roth v. Brownell*, 94 App. D.C. 318, 215 F.2d 500, cert. den. 348 U.S. 863; *Manning v. Stevens*, 93 App. D.C. 225, 208 F.2d 827; *Mulligan v. Andrews*, 93 App. D.C. 375, 211 F.2d 28; *Deak v. Pace*, 88 App. D.C. 50, 185 F.2d 997.

The Civil Service Commission refused to investigate the "propriety" of the abolishment of appellant's position or to question the background of the case despite appellant's pleas (Special J.A. A-33). Following this, appellant sought to have the District of Columbia Commissioners again grant an administrative review of the separation and their failure to follow their own regulations (Special J.A. A-34). They didn't even extend to appellant the courtesy of a reply, nor did they respond to the Civil Service Commission, which also placed the issue back in the lap of the District of Columbia (Special J.A. D-20).

Appellant asked the Civil Service Commission also to reconsider the issue of the District's failure to abide by its own regulations, but the Commission, in a unique bit of issue dodging, limited such review to appeals filed after September 18, 1959, the date of the Civil Service's recognition of the Court of Claims decision in *Watson v. United States*, 162 F. Supp. 755, requiring agency compliance with its own regulations (See Special J.A. A-37 and D-25 and 26).

Appellees in holding out to the public that an administrative avenue of appeal was available are now estopped to deny such administrative review to this appellant. *Vestal v. C.I.R.*, 80 App. D.C. 264, 268, 152 F.2d 132, 136.[6]

The failure to accord appellant the review guaranteed by the regulations constitutes reversible error.

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[6] See also 2 Davis Administrative Law Treatise §§ 17.01, 17.02, 17.03, 17.09 (1958 Supp. 1963). cf. *Crawford v. Board of Education*, 20 Cal. App. 2d 391, 67 P.2d 348 (Dist. Ct. App. 1937).

**II. Was Plaintiff Properly Removed to Excepted Service From the Classified Service, Thereby Precluding Him From Entitlement to Reassignment and Bumping Rights?**

It is appellees' contention that appellant was serving in a position excepted from the competitive service and thus not entitled to reassignment as a matter of right.

But the fallacy in this position is that appellant was never properly removed from the "Classified" service and placed in an excepted position, so he cannot now be held to have been serving in a category into which he was never properly placed. For as the record shows, appellant was first advised of his "Excepted Service" category when he received the reduction notice of February 6, 1958 (Special J.A. A-6).[7] The record establishes that appellant first obtained Classified Civil Service Status on October 1, 1941. He received no notice of termination of such status (J.A. 20) and was transferred[8] to the Government of the District without any notice whatsoever of change in status. No notice of conversion has ever been produced by appellees, nor could any be produced, since none is in existence.

The Lloyd-LaFollette Act, quoted at p. 21, *infra*, requires explicit procedures to be followed in effecting any removal from the Classified service. These were not followed in appellant's case. No such notice in writing was ever given to appellant so his removal from the Classified Civil Service has never been effected.

Nor can it be successfully argued that he tacitly consented to such action of removal when he transferred to the District of Columbia Government. It is well settled that it is against public policy to hold

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[7] Appellant presented the same point to the Civil Service Commission in clear and unequivocal terms — See: Special J.A. A-32, pp. 1-3.

[8] Nature of action was "Appointment (By transfer)" without any notation of conversion in status. Special J.A. A-1.

an employee bound by a waiver of a right attached to his office by an Act of Congress. In *Glavey v. United States*, 182 U.S. 595, 610, the Supreme Court said that the mere failure of one to demand the salary fixed by Congress is not the waiver of his right to it. In *United States v. Andrews*, 240 U.S. 90, an officer was granted leave by the President of the United States, on the condition that he forego his salary while on leave. The Supreme Court said this was against public policy. In *MacMath v. United States*, 248 U.S. 151, this was reaffirmed.[9]

The Lloyd-LaFollette Act does not give either the District of Columbia or the Civil Service Commission authority to take away appellant's rights and place him in an "excepted" category. Ever since 1886, Congress has been most zealous in protecting the rights of classified employees. Had it intended that an employee could be divested of such right without full and complete notice, it would have said so. There is no authority which can be implied for taking away from a Civil Service employee rights which he has previously acquired. This was the specific holding in *Roth v. Brownell*, 94 App. D.C. 318, 215 F.2d 500, cert. den. 348 U.S. 863. Plaintiff never lost the rights he acquired under the Lloyd-LaFollette Act when he acquired permanent competitive status in the Classified Civil Service, and there is no showing whatsoever that the requirements of the Act were ever met to divest him of that status.

Having such status, appellant is entitled to the benefit of those Civil Service Regulations[10] applicable to reductions in force. 5 C.F.R. 20.5(b) quoted at page 27, *infra*, gives appellant the right to reassignment and/or retreat. The record establishes the availability of a Posi-

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[9] See also: *William W. Ford v. United States*, 69 F. Supp. 332, 108 C.Cls. 174; *Bancroft v. United States*, 56 C.Cls. 218, aff'd per curiam, 260 U.S. 706.

[10] The regulations by their very definition include employees of the District of Columbia. *Born v. Allen*, 110 App. D.C. 217, 291 F.2d 345, 351.

tion Classifier GS-11 position (Special J.A. A-4), or Organization and Methods Examiner Position GS-11 (Special J.A. A-3), or a Position Classifier GS-9 (Special J.A. A-2) jobs for "retreat" to by appellant. The record also establishes that at least one GS-11 position was always continuing and available for reassignment in the Position Classification area (Special J.A. A-11).

The denial to appellant of the rights under these regulations constituted error. Such procedural omissions entitle appellant to the relief sought below.

III. Appellant's Separation Was Arbitrary and Capricious.

The record of proceedings establishes that at the very time District of Columbia officials were declaring appellant surplus as a Position Classifier, the Civil Service Commission was taking notice of the District's heavy classification workload and specifically advising District officials to do an extensive amount of additional classification work (Special J.A. A-7). District officials in recognition of this need even went so far as to hire a new Position Classifier (Special J.A. A-10) and promote the new employee to a GS-11 position (Special J.A. A-11). Even a brief scrutiny of the process demonstrates that the notice of appellant's position being abolished because of internal reorganization (Special J.A. A-6) highlights the attitude of appellant's superiors in aiming a reduction in force at him alone in order to retaliate against him for his previous success in grievance proceedings. The record also amply establishes the friction which existed between appellant and his superior, which culminated in this illegal separation.

This abuse of the removal procedure and the consistent refusal by the District officials to accord appellant any hearing whatsoever, which refusal was joined in by the Civil Service Commission, was arbitrary and capricious. Arbitrary and capricious actions by administrative officials rendered in bad faith to obtain an illegal separation void the

action in question and entitle the separated employee to appropriate relief. *Daub v. United States*, 223 F. Supp. 609, 612 (E.D. N.Y. 1963); *DiConstanzo v. Willard*, 165 F. Supp. 533, 539 (E.D. N.Y. 1958); *T. Michael Smith v. United States*. 151 C.Cls. 205; *Knotts v. United States*, 128 C.Cls. 489; *Crocker v. United States*, 130 C.Cls. 567, 575; *Levy v. United States*, 118 C.Cls. 106, 112; *Gadsden v. United States*, 111 C.Cls. 487, 489-490.

## IV. The Allowance of Appellees' Motion To Strike Statements and Exhibits Was Improper.

Appellees' Motions to strike certain exhibit material and certain paragraphs of the District Court Rule 9(h) statement were granted and the matters contained therein stricken by the Court below. Appellees relied upon Rule 12(f) of the Federal Rules of Civil Procedure for legal support. The material ordered to be deleted or disregarded fell into two major areas:

> (1) Statements and exhibits detailing appellant's attempts at administrative and judicial relief, following the Civil Service Commission decision, to countermand the asserted defense of laches.[11]
>
> (2) Statements and exhibits, obtained in part only after a lengthy discovery process, to support appellant's allegation that the reduction was not "bona fide" — an issue which the District and the Civil Service Commission refused to pass upon administratively.

We turn to the latter category. Appellees seem to contend that the

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[11] In view of the lower Court's omission of any findings of fact or conclusions of law to support dismissal on the ground of laches, this defense is not discussed in this brief, *infra*, and the material presented below in opposition to the defense of laches is similarly not considered in this section of the brief.

material presented in support of the allegation that the separation process was not "bona fide" should be stricken because it was not presented administratively.

The rebuttal to this contention lies in the fact that appellant was denied the opportunity, either before the District Officials or Civil Service Commission, to be heard on the question of the propriety of the reduction with special emphasis on the retaliation aspects of the reduction pretext used to cover up the arbitrary actions of appellant's superiors. This is so even though he did raise the issue in his appeal (Special J.A. A-27 and D-8). As we have pointed out below, the District refused a grievance hearing and refused to consider the issue of the job abolition itself following the Commission's refusal to take jurisdiction.

The Commission denied appellant any hearing either at the Bureau (Regional) level or before the Board of Appeals and Review. Although appellant made the same allegations with respect to the impropriety and illegality of the attempted job abolition before both District Officials and the Commission, he was denied the opportunity to be heard on these issues. There is no right of discovery before the Commission and no power of subpoena over either persons or documents. 5 C.F.R. (1957 ed.) 22,607. The evidence secured in the Court below, only after extensive discovery procedure (J.A. 11-19), is a testimonial to the zealous desire on the part of the appellees to thwart appellant at every turn and to refuse to make the evidence available without Court order. The material finally obtained via discovery was not otherwise available to appellant and does, we submit, amply support his contention that there was no necessity to remove appellant, a Position Classifier, in one breath and hire an outsider Position Classifier in another.

Motions to strike are not favored. 2 Moore's Federal Practice (2nd Ed.) § 12.21. The material should only be stricken from the Rule

9(h) statement if it has no possible bearing upon the matters being litigated, and all doubts in this area are to be reconciled in favor of appellant. 2 Moore's Federal Practice (2nd Ed.) § 12.21, and cases cited therein.

Appellees raised the same objections to the production of the evidence during discovery which they made in their motions to strike. These objections were overruled in granting discovery and the material ordered produced because appellant was never granted his administrative "day in Court" on these matters, despite his having placed the points in issue at every opportunity.

Appellant used all the documentary material then available in the administrative proceedings. On the basis of the record below, the striking of certain paragraphs in the Rule 9(h) statement and of exhibits supporting appellant's allegations of improper motives and administrative actions should not be upheld on the ground this material was not presented to the Civil Service Commission. The Commission's refusal to hear or consider the matter as alleged, and the unavailability of certain other evidence save through discovery in a Court proceeding, clearly removes the material ordered stricken from the scope of any sweeping generalization such as failure to exhaust administrative remedies. Here the non-presentation administratively resulted only from appellant's being thwarted by appellees at every turn in the administrative process. The order granting the Motion to strike should be reversed.

## CONCLUSION

If the ruling below is permitted to stand, every government official has a license to separate any subordinate he selects by simply terming the separation an abolishment of position under a reorganization or reduction in force. And the Civil Service Commission can sit blindly by and permit this miscarriage of justice without any hearing whatsoever, on the ground it lacks jurisdiction over the propriety of the agency decision. And then the Courts can escape their responsibility by allowing a motion to strike on the ground the material was not presented administratively. And so by the process of administrative musical chairs, a loyal government employee can be pushed out solely at the whim and caprice of a superior.

For the reasons detailed above, this abuse of decency and fair play must be halted and the judgment below reversed with direction to order appellant's records corrected to void the illegal separation and with direction to award appellant salary lost following his wrongful separation on March 10, 1958.

Respectfully submitted,

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# APPENDIX

## STATUTES INVOLVED

The Lloyd-LaFollette Act, as amended, 5 U.S.C. 652, provides:

**"Removal without pay from classified civil service —Only for cause; notice; copy of charges; time to answer; examination; record; persons exempt**

"(a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 863 of this title, only if he so elects.

## REGULATIONS INVOLVED

Chapter 15 of the District of Columbia Personnel Manual provides:

### CHAPTER 15 - GRIEVANCES AND APPEALS
Section A. Employee Grievances

1. SCOPE

These procedures are established to assure an avenue of approach wherein an individual employee may seek adjustment of a personal complaint or grievance arising out of individual working conditions or job relations. Grievances or appeals resulting directly from reduction in force, demotion, position classification actions, policies, and administrative practices are covered elsewhere in Chapter 15.

2. ESTABLISHMENT OF GRIEVANCE PROCEDURES BY DEPARTMENTS

Each department shall develop an employee grievance procedure which shall be made available to all employees within the department. The procedure shall incorporate all of the prescribed measures of this Section A and, in substitution for the flexible provisions, shall include such specific provisions as are dictated by the organization and peculiar needs of the department. The language of this Section A may be adopted verbatim as desired, or it may be used as a guide by departments in developing their procedures. Each department shall submit its procedure to the Personnel Office for approval. After receiving approval the department shall have copies of the procedure reproduced and distributed to present employees and to those employed hereafter.

3. POLICY

It is recognized that in any organization, regardless of its size, conditions conducive to employee dissatisfaction and resentment may exist. Grievances should be ad-

justed promptly and equitably in order that the attitudes of employees, and consequently their work, will not be adversely affected. It is good management practice and sound personnel policy to establish and maintain an effective procedure for this purpose. Since grievances and misunderstandings may arise in any work situation, the statement of a grievance in good faith by an employee should not cause him to be regarded as disloyal to his supervisor or organization. Neither should it be considered a reflection on the employee's supervisor or the general management of the department. It is the policy of the Commissioners that all employees receive fair treatment and that an employee filing a complaint in accordance with departmental procedure not be impeded but be assured of freedom from restraint, interference, coercion, discrimination, or reprisal. Supervisory action against an employee for filing a complaint shall be considered grounds for disciplinary action.

* * *

6. GENERAL PROVISIONS

a. Time limitation for filing grievance complaint. An employee should submit his complaint without delay, but in any event within one month after the employee becomes aware of the action giving rise to his grievance. An extension in filing time may be granted upon an acceptable showing of extenuating circumstances which prevent timely filing of the complaint. The establishment of a time limit on filing is not intended to preclude the employee's right to submit evidence concerning events which lead up to the alleged unfair action.

b. Employee representation. The employee should present his own case, although, if he so desires, any person of his choice may accompany and represent him. The employee shall be present at each step within the department and have full opportunity to present his complaint. Presentation of the grievance within the department may be verbal, but at the discretion of the department head,

appeals beyond the first step (immediate supervisor) may be required to be presented in writing. The employee, in receiving decisions, shall be informed of all factors pertaining to management's position in the case and his right to reply thereto. If the employee's appeal is not upheld, the reply should recognize each of his major points and state clearly the facts, circumstances, and regulations that were taken into consideration in arriving at the decision. The employee shall be informed, also, of his right of appeal to the next step.

c. Witnesses. The complainant may have witnesses appear and testify in his behalf, including such witnesses as may be ordered, pursuant to his request, to appear before the committee. However, the individual conducting the hearing shall limit the number of witnesses and the scope of testimony to persons and matters having a direct relationship to the case under consideration. If the appearance of a witness is denied by the committee, the records of the proceedings shall include the name of the proposed witness, the nature of his testimony, and the reasons for denial of his appearance.

d. Steps to be followed. Departmental procedures shall allow for either three or four progressive steps through which employees may present grievances. These steps, with step (2) being optional, shall be (1) Immediate supervisor. Upon receiving the departmental procedure, an office head may designate higher level supervisors instead of first line supervisors to receive grievances at the first step particularly where indicated by the organizational structure of the office. Before transmitting copies of the departmental procedure to employees, the office head should attach a notice of any exception, (2) Chiefs of divisions, bureaus or other major organizational units, (3) Head of the department, and (4) Board of Commissioners (Central Grievance Committee). In the interest of prompt solution of grievances, departmental procedures should not attempt to provide for action by all levels of supervision between the immediate supervisor and the department

head. However, it should be stated that intermediate supervisors are to be consulted and informed concerning grievances which involve employees under their general jurisdiction. Furthermore, provision should be made for an employee to present his grievance to the next higher supervisor if he believes that he would not receive impartial treatment from his immediate supervisor.

* * *

f. Records. If an appeal is required to be in writing, the department shall be responsible for maintaining an adequate record of the grievance. If the employee requests and is granted a formal hearing, a record of the hearing shall be kept and shall include the names of all individuals present, a statement of the grievance, and a brief summary or transcript of each person's testimony.

g. Department hearing committee. The department head shall establish a hearing committee within three work days after receiving a grievance appeal if the employee requests a formal hearing, or if the department head is of the opinion that formalized procedures should be followed. The committee shall consist of three members selected as follows:

(1) One member designated by the department head;

(2) One member designated by the employee;

(3) One member who shall be chairman, designated by the first two members.

All three members of the committee must be District Government employees. Employees serving in the area of personnel administration may not participate as members. The committee shall review the case, conduct a hearing, and submit a factual summary and its recommendations to the department head, with a copy to the employee or his representative. The department head shall then give his decision in writing to the employee or his representative and shall make certain that the decision is known and understood by the supervisors involved. If the

decision is not in the employee's favor, he shall be advised of his right to appeal in writing to the Board of Commissioners (Central Grievance Committee). When an appeal is so made, it must be transmitted to the department head, who will forward the complete case record to the Personnel Office. After making necessary notations for record purposes, the Personnel Office will forward the complete case record to the Board of Commissioners (Central Grievance Committee).

h. Time limit for decisions. Under normal circumstances, decision at the first step should not require more than two work days; at the second step, five days; and at the third step, ten days. Whenever a decision is delayed, the employee shall be advised in writing within the above time limits of the reason for delay and approximate date that he may expect a decision.

* * *

7. CENTRAL GRIEVANCE COMMITTEE

a. Duties. The Central Grievance Committee shall assist the Board of Commissioners in arriving at just and equitable decisions on employee grievances which are appealed to the Commissioners. The committee shall make a full and complete study of the grievance. At the conclusion of its consideration, and hearing if one is held, the committee shall evaluate the evidence and submit to the Commissioners a record of the proceedings (to include membership, votes, and a statement of any minority view if a member desires to make such expression), a statement of its findings, and its recommendation.

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5 C.F.R. (1957 ed.) Part 20, provides in part as follows:

"20.1 Extent of part. The regulations in this part establish degrees of retention preference and uniform rules for reduction in force. They apply to all civilian employees in the executive branch of the Federal Government, in those parts of the Federal Government outside the executive branch which are subject by law to

the competitive civil service requirements, and in the municipal government of the District of Columbia, except those whose appointments are required to be approved by the Senate and those who are appointed by the President of the United States. (Sec. 20, 58 Stat. 391; 5 U.S.C. 869)." (Underscoring added).

5 C.F.R. 20.5(b) provides:

"(2) No employee in any subgroup of tenure group I or II who is willing to accept a reasonable change in position may be separated, furloughed for more than thirty (30) days, or subjected to greater reduction in pay than necessary under such reasonable change in position, (i) if he is qualified for a position which will last as long as three (3) months in another competitive level in his present competitive area in which an employee with lower subgroup standing is retained, or (ii) if he is qualified to go back to a position which will last as long as three (3) months from which he was promoted (or to an essentially identical position) in his present competitive area in which an employee with lower retention standing (and without retention priority based on a statutory retention right) is retained."

## RULES INVOLVED

Rule 12(f) of the Federal Rules of Civil Procedure provides:

"(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleadings any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

BRIEF FOR APPELLEES MACY, ET AL.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 19,136**

---

ANDREW R. PENCE, APPELLANT

*v.*

WALTER N. TOBRINER, *et al.*;
JOHN W. MACY, *et al.*, APPELLEES

---

**Appeal from the United States District Court for the District of Columbia**

---


DAVID C. ACHESON,
*United States Attorney.*

FRANK Q. NEBEKER,
ARNOLD T. AIKENS,
MARTIN R. HOFFMANN,
*Assistant United States Attorneys.*


C.A. No. 1309-62

## QUESTIONS PRESENTED

1. Where appellant was separated from his excepted-service position with the Health Department of the District of Columbia Government after proper notice of a reduction in force,

(a) Is the wisdom of the reorganization pursuant to which appellant's position was abolished open to appellate review?

(b) Was appellant (who was alone in his competitive level) entitled to classified-service reassignment rights simply because he had once been in the classified civil service and the record does not show he was formally notified that a position to which he accepted appointment (and from which he accepted a further appointment, reassignment and promotion) had placed him in the excepted service?

2. Did the Civil Service Commission abuse its discretion in refusing a belated request to reopen appellant's case (some fourteen months after final decision by the Board of Appeals and Review) for retroactive application of a newly-instituted Commission policy of reviewing agency adherence to its own regulations, where the Department had had no regulations (and had repeatedly refused intra-departmental appeal), where appellant had in fact secured a lengthy interview with one of the District of Columbia Commissioners in which he presented his case, and where appellant had not factually supported his claims of prejudice and bias in the appeal he had perfected through the Commission?

## INDEX



## TABLE OF CASES



* Cases chiefly relied upon are marked by asterisks.

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No. 19,136

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**Appeal from the United States District Court for the District of Columbia**

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## BRIEF FOR APPELLEES MACY, ET AL.

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## COUNTERSTATEMENT OF THE CASE

Upon abolition of his GS-12 position with the Department of Health of the District of Columbia Government (hereinafter referred to as "the Department") appellant was notified on February 6, 1958, of his separation by reduction in force (RIF) on March 10, 1958 (D.1-A.6).[1] Appeal to the Civil Service Commission was noted

[1] The record on this appeal includes three groups of exhibits in a Special Joint Appendix which contains numerous duplications. Accordingly, references to the administrative record (Special Joint

on February 17, 1958 (D.3-A.26; D.4). The Chief of the Appeals Examining Office upheld the action on May 13, 1958 (D.17-A.30); the Commission's Board of Appeals and Review affirmed the validity of the discharge on February 6, 1959 (D.20-A.33); March 21, 1960 brought the Commission's refusal of appellant's request to reconsider the case (D.22-A.36; D.23-A.37). The complaint in the instant suit was filed in the court below on April 23, 1962, seeking injunctive relief and declaratory judgment (J.A. 1). This appeal is taken from award of summary judgment to defendants-appellees which upheld the Civil Service Commission's determination that appellant's discharge was proper (District Court Order dated November 17, 1964, J.A. 79).

The reasons in fact for the elimination of appellant's position are set forth in the administrative record: an intermediate level of review—performed by appellant as Chief Position Classifier—had become obsolete. Development of the classification function in the Department had progressed to the point where the recommendations of the journeyman classifiers as to the content and classification of positions could most efficiently be acted upon directly by the Chief, Administrative Management Division (who had always had final approving authority). In the judgment of the Department, the RIF was necessary to improved efficiency and effectiveness of the program (D.7-A.25; D.13 (C.6); D.17-A.30; D.20-A.33). The Commission's examiner had specifically confirmed the factual basis for the RIF (Report of Investigation, D. 15), rejecting appellant's repeated contentions that the reorganization was unwise and was a sham and pretext to get rid

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Exhibit D, numbered 1 to 26) will be cited as "D.——"; citations to the material filed by appellant in support of his motion for summary judgment in the District Court (Special Joint Exhibit A, numbered 1 to 41) will be "A.——"; exhibits filed in support of the District Commissioner's motion for summary judgment (Special Joint Exhibit C, numbered 1 to 6) will be designated "C.——" (parallel citations will indicate duplications, such as D.1-A.6). Material compiled in the printed joint appendix will be referred to as "J.A. ——."

of him (D.9-A.27; D.10-A.41; D.19-A.32). In so doing, both the Chief Examiner and the Board of Appeals and Review observed that the evidence did not support appellant's contentions,[2] that the personnel action was the cause of appellant's relief and that the wisdom of the personnel action was not open to their review (D.17-A.30; D.20-A.33). The District Court accordingly upheld the Commission on the merits of appellant's discharge (Order of November 16, 1964, *supra*, paragraph 18d, J.A. 82).

As to appellant's entitlement to award of another position by the Department, the Commission determined that (1) appellant was in the excepted—rather than competitive—service by virtue of his employment in the District of Columbia Government; he was alone in his competitive area, so that he was not entitled to "bumping" rights or reassignment under Civil Service Regulations or government employee protective legislation (D.2-A.19; D.13); (2) aside from this, appellant's discharge was proper since there was no continuing competitive-service position in his competitive area which the Department was obliged to offer him (D.17-A.30; D.20-A.33). The Commission's ruling was affirmed by the District Court (Order, *supra*, paragraphs 6, 12 and 18d, J.A. 81-82).

Appellant's resistance to separation was not limited to appeal through Civil Service channels. Energetic remonstrance, both within and without the Department (A. 12-18, 20-23, 34; and D.7-A.25, D.10-A.41, D. 8, 12, 14, A. 24), culminated in an hour-and-a-quarter-long interview with one of the District of Columbia Commissioners

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[2] Appellant attempted to remedy this failure by accosting the District Court with a welter of exhibits bearing on the necessity for and wisdom of reduction in force. That Court upheld the government's motion to strike appellant's affidavit (J.A. 20-26) and several of these exhibits (A. 5, 7-11, 24-25), since they had not been before the Commission and thus were immaterial. Order, *supra*, paragraph 19, J.A. 82. In his statement of facts to this Court, in cavalier disregard of proper restriction to the administrative record, appellant again argues a state of facts as bearing on the merits which he never put before the Commission. Appellant's brief, pp. 3 (entire), 4 (first paragraph) and 5 (first full paragraph). As they were disregarded in the District Court, they should remain disregarded here.

wherein appellant presented his case (D. 12, 14). However, he was allowed no formal grievance proceeding in the Department since—as was early pointed out to him—no regulations permitted grievance appeal within the District of Columbia Government from reduction in force (A. 20-21; District of Columbia Personnel Manual, Ch. 15, Appellant's brief at p. 22). The Civil Service Commission's scope of review at the time of appellant's appeal did not include review of agency compliance with its own regulations. While some seven months following a policy change requiring such review (and fourteen months after affirmance of appellant's separation) appellant made application to the Commission seeking retroactive application of the new policy, the Commission refused to reopen the matter (D.22-A.26; D.23-A.37).

## REGULATION INVOLVED

Title 5, Code of Federal Regulations, § 20.5 (a), (c) provides:

> (a) *In general.* Employees who cannot be retained in their positions because of a reduction in force will be changed to positions that will last as long as three (3) months, separated, or furloughed.
>
> • • • •
>
> (c) *Employees in positions excepted from the competitive service.* No employee in a position excepted from the competitive service may be separated, furloughed for more than thirty (30) days, or reduced in grade or pay in a reduction in force if a competing employee with lower retention standing is retained in the same competitive level.

## SUMMARY OF ARGUMENT

Appellate judicial review does not lie to test the wisdom of executive personnel action. Since there is abundant basis in the administrative record upon which the Civil Service Commission affirmed abolishment of appel-

lant's position—as the District Court found—the discharge must be affirmed on the merits.

Alone in his competitive level in the excepted service, appellant is not eligible for reassignment to other posts. While he attempts to fit himself into a narrow category wherein even in the excepted service he would be entitled to notice of the reasons for discharge, the facts of his case do not qualify him for such special treatment (which he received anyway); beyond this, the reassignment rights he claims are not afforded by the claimed exception.

At the time of appellant's administrative appeal, the Civil Service Commission did not review an agency's adherence to its own regulations, though some months after final decision of appellant's case Commission policy was revised by announcement that the additional review would be a part of Commission action on every appeal. Appellant has not demonstrated abuse of discretion in the Commission's refusal to reopen his case for review of compliance with grievance procedure regulations, where no regulations existed, where appellant had already presented his case to the highest level in the District of Columbia Government to no avail, and where appellant had never presented to the Commission evidence of the bias and prejudice he claimed as the reason for his separation.

## ARGUMENT

### I. Appellant's discharge due to reduction in force was properly upheld by the District Court.

It is nearly superfluous in this jurisdiction to prelude that judicial review of personnel actions of the kind presented in the instant case is extremely limited: only if the action taken is arbitrary and capricious, or if statutory procedures are not followed, will the ruling of the Civil Service Commission be set aside. *Eustace* v. *Day*, 114 U.S. App. D.C. 242, 314 F.2d 247 (1962); *Hofflund* v. *Seaton*, 105 U.S. App. D.C. 171, 265 F.2d 363, *cert. denied*, 361 U.S. 837 (1959); *Saggau* v. *Young*, 100 U.S.

App. D.C. 3, 240 F.2d 865 (1956); *Boylan* v. *Quarles*, 98 U.S. App. D.C. 337, 235 F.2d 834 (1956); *Wagner* v. *Higley*, 98 U.S. App. D.C. 291, 235 F.2d 518, *cert. denied*, 352 U.S. 936 (1956); *Powell* v. *Brannan*, 91 U.S. App. D.C. 16, 196 F.2d 871 (1952). In *Adams* v. *Humphrey*, 98 U.S. App. D.C. 40, 41, 232 F.2d 40, 41 (1955), this Court observed:

> The creation and abolition of government jobs, within the scope of the authority given by law to supervisory officials, requires primarily a judgment as to the needs of public business. The determination of these needs plainly involves the exercise of discretion . . . . Since there is no showing that appellees abused their discretion or departed from applicable law and procedures, in determining appellant's jobs should be abolished we cannot disturb their action.

The record establishes that elimination of appellant's position was part of such a reorganization within the prerogative of exectutive management. Elimination of appellant's intermediate—and duplicated—reviewing function and allocation of his duties elsewhere was hardly irrational or arbitrary. Appellant's chief quarrel was with the wisdom of the reorganization, not with the fact that there had been modification of the classification procedures (D.9-A.27; D.10-A.41; D.19-A.32). Simple difference of opinion would not establish abuse of agency discretion, even if appellant's protests had been supported in the record. *Cf. Studemeyer* v. *Macy*, 116 U.S. App. D.C. 120, 121, 321 F.2d 386, 387 (1963). His claims of sham and pretext were specifically rejected by the Civil Service Commission Inspector in the letter drafted by him for the Appeals Examining Office (D. 15, 17). While appellant's brief in the Commission stressed the bias and prejudice of his superiors as responsible for his separation, no supporting evidence was before the Commission at any time to rebut the examiner's finding.[3]

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[3] Appellant invites this court—as he did the court below—to traipse beyond the administrative record and consider an affidavit and several documents filed (and stricken) in the District Court in

Appellant concedes, as needs he must, that the position from which he was eliminated was in the excepted service, so that absent an exception to the general rule, he cannot claim reassignment rights under the statutes and regulations which applied to "classified" or "competitive" federal positions. See 5 U.S.C. § 652; 5 C.F.R. §§ 01.2, 1.102(f), 20.5 (January 1, 1958, ed.). The exception he seeks to create is based upon his having been in Classified Civil Service Status prior to his "appointment (by transfer)" into excepted service in January 1953 (J.A. 1). Since "explicit procedures" were not followed in his "removal" from classified service, he claims entitlement to rights accruing to classified service purported to have been improperly terminated, in reliance upon *Roth* v.

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aid of his claims of sham and bias of his supervisors (Br. 3-4). See footnote 2, *supra*. He urges that because this material was unavailable to him by means short of trial court discovery, and since he had no hearing in which to produce the evidence, it may now appropriately be considered here (Br. 17). This rationale would not apply to his claim of prejudice from an earlier grievance proceeding, since the letter and the material in appellant's affidavit on which it is based were available to appellant even before the RIF notice (A. 5; J.A. 21-23). He needed no administrative hearing to put them before the Commission. The material pertaining to the wisdom of abolishing appellant's position does no more than to establish that in the questioned reorganization the agency was proceeding along lines of improvement recognized as meritorious by the Commission itself; *inter alia* it was specifically recommended that the function performed by appellant should be more closely coordinated with personnel and other management activities, a result reasonably to be expected by eliminating intermediate review and having the personnel manager assume final review duties (A. 7, especially p. 2, paragraph 3; A. 8-10). He cited no authority which would allow consideration of this matter by the District Court or by this Court. At no time did he move for remand to the Commission for reconsideration in the light of this "newly discovered" material; rather his motion for summary judgment sought quite the opposite effect. Particularly in this posture of the case, it was not error for the District Court to strike the extraneous matter. F.R. Civ. P. 12(f); see *Wagner* v. *Higley*, *supra*; *cf. Edwards* v. *United States*, 312 U.S. 473, 482 (1941); *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952); *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 155 (1946).

*Brownell*, 94 U.S. App. D.C. 318, 215 F.2d 500, *cert. denied*, 348 U.S. 863 (1954).

There are two insurmountable obstacles to the application of the *Roth* exception to appellant's case. The first bar arises from the peculiar facts in *Roth*, where the appellant's classified position was declassified into the excepted service while yet he held it; his protection against removal without cause thus was stripped from him by executive fiat and for no cause given. This court held that the Lloyd-LaFollette Act, 5 U.S.C. § 632, precluding unjustified relief, applied directly to the peculiar facts of the situation:

> Roth was once in the classified civil service, *did not leave it voluntarily*, and is now out of it. It follows he was *removed* from it. 94 U.S. App. D.C. at 320, 215 F.2d at 502 (emphasis added).

The same result can hardly obtain here where change of status resulted from knowing, voluntary acceptance of an appointment to a new and different position already constituted in the excepted service (followed by a succeeding appointment, reassignment and promotion), as in appellant's case (A. 1-4). In the parlance of neither the Lloyd-LaFollette Act, *supra*, nor the regulations did this appellant's acceptance of the appointment constitute a "removal." He was in the excepted service and had none of the classified-service rights he claimed. *Bailey* v. *Richardson*, 86 U.S. App. D.C. 248, 182 F.2d 46 (1950), *aff'd*, 341 U.S. 918 (1951).

The second precluding factor is that even if the *Roth* result obtained here to clothe appellant with a protected status *vis-à-vis* improper discharge, there is no metamorphosis suggested in *Roth* to change the excepted character of the whole Health Department for his benefit to allow the reassignment rights he seeks. The regulations defining the rights he seeks preclude any notion that they applied against others than employees in continuing competitive positions. 5 C.F.R. § 20.5(b), *supra; Bailey* v. *Richardson, supra.* There were not and never had been

any such positions in the department. In total absence of authority, therefore, appellant's proposed extension of the particularized holding in *Roth* would be unwarranted.

In short, appellant was entitled only to displace an employee of lesser retention standing in his own competitive level. 5 C.F.R. § 20.5(c). He was alone in his competitive level, however, as the register showed (and the Commission affirmed), so that no such reassignment was required (D.2-A.19; D.13). *Cf. Powell* v. *Brannan, supra* at 18, 196 F.2d at 873.

### II. There was no requirement that the Civil Service Commission review compliance with the Department's regulations.

Appellant has not seriously contended that at the time his appeal was before the Commission, the Commission was obligated to review agency compliance with its own regulations. This review was a function which the Commission not only had never undertaken but had expressly disavowed at the time of the completion of appellant's administrative appeal (D. 25). Appellant initially accepted this ruling below. It was only after the Commission revised this policy, expanding its reviewing jurisdiction, that appellant sought to have the case reopened by the Commissioners (D. 26; D. 23). He has not attempted to demonstrate abuse of discretion in the Commissioners' refusal to reopen his case and apply the new policy retroactively. See 5 C.F.R. § 22.503-4 (January 1, 1958 ed.).

Nor possibly could he: there were not and never have been regulations in force assuring a grievance appeal from a reduction in force within the Department. See Brief for Appellees Tobriner, *et al.*, 28-30. An indication in the regulation at the time of his relief that there might at some future time be such regulation cannot be held to have left the Department at the mercy of appellant's notions of what the procedures should have been. It is well in this context to note—as the administrative record reflects—that appellant had in fact carried his grievance

even unto lengthy interview with one of the Commissioners (D. 12, 14). It bears the emphasis of reiteration to point out that at no time during the appeal through the Commission did appellant seek to support his claims of impropriety with factual material. It could hardly be abuse of discretion for the Commission to have reopened a fourteen-month-old case retroactively to require an empty formality, even had there been a regulation. On the basis of the foregoing, then, the District Court was required to uphold the ruling of the Commission: appellant has had full rights of appeal and full opportunity to present factual basis for what claims he cared to press. No rights—other than those of his own hopeful fancy—have been denied him.

## CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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# BRIEF FOR APPELLEES COMMISSIONERS OF THE DISTRICT OF COLUMBIA

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does the record contain substantial evidence to support the finding that appellant's separation from his employment was the result of a reduction in force made necessary by a valid departmental reorganization and realignment of duties?

2. May an employee in the "excepted" civil service be separated from his employment where such separation results from a reduction in force made necessary by a valid departmental reorganization and realignment of duties?

(a) As an "excepted" employee, was not appellant properly found to be excluded from the benefits of the Lloyd-LaFollette Act?

(b) As an "excepted" employee, was not appellant properly limited to reassignment or "bumping" rights except against those who might be in the same competitive level?

3. Was it correctly determined that appellant was not entitled to an intermediate appeal at the department level in the District of Columbia Government?

# I N D E X

## SUBJECT INDEX

## CASES CITED

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* Cases chiefly relied upon are marked by asterisks.

## UNITED STATES CODE CITED



## OTHER AUTHORITIES CITED

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

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No. 19,136

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ANDREW R. PENCE,

Appellant,

v.

WALTER N. TOBRINER, et al.,

Appellees.

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Appeal From The United States District Court
For The District Of Columbia

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# BRIEF FOR APPELLEES COMMISSIONERS OF THE DISTRICT OF COLUMBIA

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## COUNTER-STATEMENT OF THE CASE

On January 30, 1953, appellant, formerly an employee of the United States Government in the "competitive" civil service, was employed as a Position Classifier, GS-9, in the Department of General Administration of the District of Columbia Government (J. A. 20). Appellant was thereafter transferred within the District of Columbia

Government to the Department of Public Health, where he was promoted to Position Classifier, GS-12 (J. A. 20). At all times, from January 30, 1953, when he first became an employee of the District of Columbia Government, until March 10, 1958, the date of the termination of such employment as a Position Classifier, GS-12, appellant was employed in "excepted" positions, as defined by the United States Civil Service Commission (J. A. 80; Exhibits D-17, D-24).

When an internal reorganization of the District of Columbia Department of Public Health was undertaken, it was determined that appellant's position as Position Classifier should be abolished; and, by letter dated February 6, 1958, he was notified that his separation from such position, because of reduction in force, would become effective on March 10, 1958 (J. A. 80; Exhibit D-1).

The necessity for the reorganization of the Department of Public Health which resulted in appellant's separation was outlined in a letter dated March 10, 1958, prepared by the late Honorable David B. Karrick, then, a member of the Board of Commissioners of the District of Columbia, as follows:

"When the classification authority was delegated to the Department of Public Health in the latter part of 1953, it was a program new to the Department staff who felt certain extra, precautionary checks should be provided. For this reason, a position of Chief Position Classifier was established. Under this arrangement the journeymen classifiers made recommendations to him on the content and classification of positions. These recommendations were reviewed by the Chief Position Classifier who in turn also made recommendations to the Chief of Administrative Management.

"Experience with the program has developed the fact that the intermediate level of review is now unnecessary. It should be noted that the allocating authority delegated to the Department was vested in the Director of Public Health and in turn, the Chief, Administrative Management Division. The Chief Position Classifier did not have such authority and did not take final action.

"In view of the above, it can be seen that the decision to abolish the position of Chief Position Classifier is a sound administrative determination, although the change in the organization of classification work was only recently implemented. Under the new arrangement the journeymen analysts will make the recommendations on the classification of positions which will be allocated directly by the Chief of the Administrative Management Division, unless, of course, it is the type of position that

> will be allocated by the D. C. Personnel Office. It appears that the Department's action will improve the effectiveness of its classification program." (Exhibit D-7.)

Following receipt of notice, on February 6, 1958, of his proposed separation from service (Exhibit D-1), appellant mailed to the Secretary of the Board of Commissioners of the District of Columbia a request that he "* * * be apprized of any rights of appeal that I may have within the D. of C. Government prior to appealing the matter to the Civil Service Commission" (Exhibit C-2). In response to this request, appellant was notified by letter dated February 12, 1958, "* * * that there are no administrative procedures providing for such appeals [within the District of Columbia Government] in cases of reduction in force * * *, [but] you may appeal to the U. S. Civil Service Commission. The Civil Service Commission is the final authority in reduction in force matters." (Exhibit C-3.)

Appellant, on February 17, 1958, noted an appeal to the United States Civil Service Commission from the decision of the District of Columbia Government proposing his separation from employment with the Department of Public Health, by reduction in force, effective March 10, 1958 (Exhibit D-3). Appellant, thereafter

requested a full hearing (Exhibit D-9), which was denied (Exhibit D-11).

As bases for his appeal, appellant contended that:

> "1. The proposed internal reorganization is a sham and a pretext.
>
> "2. The action taken is the result of a conspiracy between Messrs. Finucane, Laguillion and Bowman.
>
> "3. The action is a reprisal action against Pence directly resulting from a grievance appeal which he filed and which was successful.
>
> "4. The agency arbitrarily withheld 'bumping rights' from Pence.
>
> "5. The action is arbitrary and capricious and based on bias and prejudice.
>
> "6. Appeal rights within the agency have been arbitrarily and illegally denied Pence.
>
> "7. Action on the appeal has been taken outside the presence of Mr. Pence and at a meeting of the Board of Commissioners of the D. C. Government.
>
> "8. Agency officials have arbitrarily withheld information from Mr. Pence which denied to him his rights under the law.

"9. Employees with lesser retention rights have been retained by the agency.

"10. The reasons given for the proposed internal reorganization are false.

"11. The action is a reprisal action aganist Mr. Pence because he refused to perform actions which were contrary to the law and regulations.

"12. Mr. Pence has been denied a personal hearing on the matter by the agency." (Exhibit D-9.)

After review of the record, the Chief, Appeals Examining Office of the United States Civil Service Commission, made, on May 13, 1958, the following findings:

"Bases 1, 2, 3, 5, 10 and 11 allege generally that the reduction in force action was not bona fide. We noted that these bases were not supported by any evidence from you or Mr. Pence.

"We found that the appellant reviewed the work of other lower-graded classifiers and made recommendations to the Chief of Administrative Management. The agency decided that the review of the work of the lower-graded classifiers, including a consideration of their individual recommendations, could

be better accomplished by direct contact with the Chief of Administrative Management. When this realignment of duties occurred, Mr. Pence's job became surplus and appropriate action, i.e., reduction in force, was initiated. We find no evidence that the agency action was taken in bad faith.

"Basis 4 alleged that 'bumping rights' were arbitrarily withheld. As stated above, the Civil Service regulations do not require agencies to offer reassignment to employees in the excepted service. Since it has not been shown that Mr. Pence has, in fact, any 'bumping right' the contention is without merit.

"Basis 6 is likewise without merit. The Retention Preference Regulations do not require agencies to grant internal appeal rights in reduction in force actions. Bases 7 and 12 are kindred contentions; therefore, we shall make no further comment on them.

"The eighth contention charges that the agency withheld information which denied Mr. Pence his rights under the law. We reviewed the reduction in force notice Mr. Pence received to determine whether the agency failed to advise him of any substantive right. Mr. Pence was told where he might see the reduction in force regulations and the register on which his name appeared. He was also advised of his appeal rights to the Civil Service Commission. In view of the disclosures

in the notice he received, we must find that basis eight is without foundation in fact.

"The ninth contention presupposed that Mr. Pence had reassignment rights which he could exercise against others in lower retention subgroups or with fewer retention points. Our finding in paragraph three disposes of this contention.

"In view of the above analysis and findings, we conclude that none of Mr. Pence's rights under the Retention Preference Regulations were violated. Accordingly, we cannot sustain his appeal." (Exhibit D-17.)

On May 21, 1958, following the decision of the Appeals Examining Office, appellant noted an appeal to the United States Civil Service Commission Board of Appeals and Review (Exhibit D-18) which, on February 6, 1959, affirmed the decision of the Appeals Examining Office (Exhibit D-20). On April 25, 1960, the Board of Appeals and Review denied appellant's request for reconsideration (Exhibit D-23).

Appellant then filed, on March 20, 1961, in the United States Court of Claims, a petition seeking reimbursement for lost wages, but thereafter voluntarily moved, on February 6, 1962, to withdraw the petition (J. A. 6).

On April 23, 1962, appellant filed in the United States District Court for the District of Columbia a "Complaint for a permanent injunction and for a declaratory judgment fixing and determining the right of plaintiff as a civil service employee in the District of Columbia Government and restoring plaintiff to his rightful grade and to such other relief as may be proper" (J. A. 1-7). Appellant alleged in his complaint, inter alia, as before, that he was at all times, while an employee of the District of Columbia Government, in the classified (or competitive) civil service; that the reduction in force was not bona fide, rather, it was a sham procedure designed solely to effect his separation; that he was improperly denied an agency appeal; and that he was wrongfully denied "bumping rights" or retreat and/or reassignment rights.

The appellees (defendants below, namely, the individual members of the Board of Commissioners of the District of Columbia and the individual members of the United States Civil Service Commission) answered, denying the allegations of the complaint and asserting that appellant's separation from the District of Columbia Department of Public Health was proper and in full accord with law (J. A. 7-11).

On January 17, 1964, appellant moved the court for summary judgment (J. A. 20), and, on March 13, 1964, all appellees filed cross motions for summary judgment (J. A. 57-58, 61). After consideration of the motions, the trial court, on November 17, 1964, denied appellant's motion for summary judgment and granted, instead, appellees' cross motions for summary judgment, on the basis of the findings as follows:

> "a. The District of Columbia had promulgated no regulations providing for an appeal to the District of Columbia by an employee directly affected by a reduction in force.
>
> "b. Plaintiff [appellant] was accorded all of the statutory and regulatory rights to which he was entitled.
>
> "c. As an employee in the excepted service, plaintiff [appellant] was not entitled to reassignment or 'bumping rights.'
>
> "d. The reduction in force was bona fide and is supported by substantial evidence." (J. A. 82.)

This appeal followed (J. A. 83).

## SUMMARY OF THE ARGUMENT

The reduction in force which resulted in appellant's separation from employment with the District of Columbia Department of Public Health was a consequence of a valid and necessary departmental reorganization. It was not "an artful scheme" contrived solely to oust appellant from his employment with the District of Columbia Government; rather, it was a "sound administrative determination" designed to improve the effectiveness and efficiency of the department.

All positions in the District of Columbia Department of Public Health have been specifically classified by the United States Civil Service Commission as "excepted" positions. Because of appellant's "excepted" status, he was not within the coverage of the Lloyd-LaFollette Act, and he was entitled to "bumping" rights only against junior employees who might be in his same competitive level. Since there were no other employees in appellant's same competitive level, there was no one against whom he could exercise any "bumping" rights.

The District of Columbia has not made provision for an intermediate departmental appeal for those whose positions are abolished through reorganization, and the rights of review afforded by the Civil

Service Regulations are adequate guarantees against arbitrary dismissal or separation from service by a District of Columbia department or agency.

Because appellant's separation from employment was proper as a matter of law, the court below correctly granted appellees' motions for summary judgment.

## ARGUMENT

### I

### Because of a valid reduction in force by the District of Columbia Department of Public Health, appellant's separation from government employment was proper.

In alleging that he was wrongfully separated from his position with the District of Columbia Department of Public Health, appellant claims that the reorganization and reduction in force procedures which led to it was contrived solely to "get" him--to "retaliate"

against him--because of disagreements which arose between himself and his superiors (Appellant's brief, pp. 10, 15).[1]

Because "in the administration of civil service, administrative boards and officers should be allowed to work out their problems with as little judicial interference as possible, * * *" the courts have narrowly limited their review of the merits or wisdom of government employee discharges. 15 AM. JUR. 2d Civil Service § 45. Thus,

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[1] Appellant's allegations are not unique in this type of action. Compare, for example, the following cases in which relief was denied the employee, though it was alleged, similarly: that certain Navy officials were "out to get her," Slavitt v. United States, 155 Ct. Cl. 606 (1961), cert. den. 370 U. S. 938 (1962); that a reduction in force was a mere sham and a reprisal, Saxon v. United States, 131 Ct. Cl. 408 (1955), cert. den. 350 U. S. 918 (1955); that a reorganization was undertaken simply to remove her from department rolls, Umbeck v. United States, 149 Ct. Cl. 418 (1960); that demotion resulted because of "an unlawful conspiracy" by fellow employees, Foley v. United States, 159 Ct. Cl. 518 (1962); that a superior officer acted with partiality, Wagner v. Higley, 98 U. S. App. D. C. 291, 235 F. 2d 518 (1956), cert. den. 352 U. S. 936 (1956); that the employee was "the object of a campaign by some of his superiors and co-workers to find fault with his work, embarrass him, and build up a case looking toward his dismissal," Boylan v. Quarles, 98 U. S. App. D. C. 337, 235 F. 2d 834 (1956); and that dismissal occurred because of his superior's alleged bias and prejudice, Levy v. Woods, 84 U. S. App. D. C. 138, 171 F. 2d 145 (1948).

in Pelicone v. Hodges, 116 U. S. App. D. C. 32, 33, 320 F. 2d 754 (1963), this Court outlined the restricted scope of review in such cases, saying:

> "Our review in this kind of case is limited to determining whether the statutory and regulatory procedures were observed and whether the challenged action was arbitrary and capricious or was supported by evidence. * * *"

See also Bailey v. Richardson, 86 U. S. App. D. C. 248, 266, 182 F. 2d 46 (1950), affirmed by an equally divided court, 341 U. S. 918 (1951), where this Court commented:

> "The line of cases in which this court has said that courts will not review the action of executive officials in dismissing executive employees, except to insure compliance with statutory requirements, is unvaried. As early as 1904, this court said that the rule had been announced so many times as not to require citation of authority." [Citations omitted.]

The record in the case at bar catalogues appellant's persistent efforts, not only administratively and judicially, but politically, as well, to compel his reinstatement and restoration to grade and pay status. He sought congressional intervention in his behalf from Senator Wayne Morse (Exhibits D-12, D-14), from Congressman John L. McMillan (Exhibits D-7, D-10), and from Congressman

Pat Hillings (Exhibit D-8); he solicited the personal intervention of the highest executive officers of the District of Columbia Government (including the late Honorable David B. Karrick, a member of the Board of Commissioners), who granted him an interview lasting one and a quarter hours, and during which he " * * * exhausted everything he cared to say" (Exhibits D-10, D-12); he appealed his separation to the Chief, Appeals Examining Office, United States Civil Service Commission (Exhibits D-9, D-17); he made a further appeal to the Board of Appeals and Review, United States Civil Service Commission (Exhibits D-18, D-20); he filed a claim with the United States Court of Claims, contesting his discharge (Exhibits A-38 to A-40); he filed in the United States District Court for the District of Columbia a complaint for a permanent injunction and for a declaratory judgment (J. A. 1-7); and he has filed this appeal.

At each administrative level, and upon judicial review, it was determined that appellant's contentions that his superiors were out to "get" him and that his separation was in retaliation for something he may or may not have done were without substance. It was also determined that the departmental reorganization and reduction in force procedures were valid and proper; that appellant's separation from

the District of Columbia Government furthered the accomplishment of such reorganization; and that he was accorded every right to review which is authorized either by statute or regulation.

As indicated earlier, appellant has maintained consistently that the reorganization and reduction in force procedure by which he was separated from the District of Columbia Department of Public Health was a "sham and a pretext" (Exhibit D-9), a "reprisal" (Exhibit D-9), an "artful scheme" (Appellant's brief, p. 11), and "an arbitrary and capricious action" (J. A. 3).

In this connection, however, the late Commissioner Karrick, after granting appellant a lengthy interview and personally investigating the causes for his separation, set forth fully in writing the reasons for the reorganization of the Department of Public Health. He concluded that the decision to abolish the position of Chief Position Classifier was "* * * a sound administrative determination," and that the departmental reorganization "* * * will improve the effectiveness * * *" of its operations. (Exhibit D-7.) In outlining the reasons for the reorganization, he wrote specifically:

> "When the classification authority was delegated to the Department of Public Health in the latter part of 1953, it was a program new to the Department staff who felt certain extra, precautionary

checks should be provided. For this reason, a position of Chief Position Classifier [that position occupied by appellant but subsequently abolished by the reorganization] was established. Under this arrangement the journeymen classifiers made recommendations to him on the content and classification of positions. These recommendations were reviewed by the Chief Position Classifier who in turn also made recommendations to the Chief of Administrative Management.

"Experience with the program has developed the fact that the intermediate level of review is now unnecessary. It should be noted that the allocating authority delegated to the Department was vested in the Director of Public Health and in turn the Chief, Administrative Management Division. The Chief Position Classifier did not have such authority and did not take final action.

"In view of the above, it can be seen that the decision to abolish the position of Chief Position Classifier is a sound administrative determination, although the change in the organization of classification work was only recently implemented. Under the new arrangement the journeymen analysts will make the recommendations on the classification of positions which will be allocated directly by the Chief of

> the Administrative Management Division, unless, or course, it is the type of position that will be allocated by the D. C. Personnel Office. It appears that the Department's action will improve the effectiveness of its classification program." (Exhibit D-7.)

In appealing his separation to the Chief, Appeals Examining Office, United States Civil Service Commission, appellant repeated his allegations that the reorganization of the Department of Public Health and the subsequent reduction in force procedure were a "sham and pretext" (Exhibit D-9.) However, in its review and evaluation of appellant's proof on this point, the Chief, Appeals Examining Office, observed: "We noted that these bases [set forth at Exhibit D-9] were not supported by any evidence from you [appellant's former counsel] or Mr. Pence" (Exhibit D-17). It then concluded:

> "We found that the appellant reviewed the work of other lower-graded classifiers and made recommendations to the Chief of Administrative Management. The agency decided that the review of the work of the lower-graded classifiers, including a consideration of their individual recommendations, could be better accomplished by direct contact with the Chief of Administrative Management. When this realignment of duties occurred,

> Mr. Pence's job became surplus and appropriate action, i. e., reduction in force, was initiated. We find no evidence that the agency action was taken in bad faith." [Emphasis supplied.]

Appellant pursued a further appeal to the Board of Appeals and Review, United States Civil Service Commission, but, again, it was determined that his separation was not wrongful or improper. Thereafter, in his complaint filed in the court below, appellant reiterated once more his contentions that the reorganization and reduction in force by the Department of Public Health were a "sham and pretext," and that court, consistent with the prior decisions of the District of Columbia Commissioners, of the Chief, Appeals Examining Office, and the Board of Appeals and Review, United States Civil Service Commission, found that "the reduction in force was bona fide and is supported by substantial evidence" (J. A. 82).

In brief, two of the three members of the Board of Commissioners of the District of Columbia (Exhibits D-7, D-12), the Chief, Appeals Examining Office, the Board of Appeals and Review, and the court below, all were satisfied that appellant had not sustained the allegations respecting his separation from the position of "Position Classifier," District of Columbia Department of Public Health.

This Court has recognized the necessity for granting the government broad discretion in dealing with problems of reorganization and reduction in force matters. In Hilton v. Forrestal, 83 U. S. App. D. C. 44, 47, 165 F. 2d 251 (1947), affirmed, 334 U. S. 323 (1948), the Court observed:

> "From a practical point of view, we think that Congress meant to give the Commission [Civil Service Commission] a wide measure of discretion in the formulation of rules to deal with the difficult administrative problem arising from the reduction of federal employees * * *."

And again, in Adams v. Humphrey, 98 U. S. App. D. C. 40, 41, 232 F. 2d 40 (1955), the Court said:

> "* * * The creation or abolition of Government jobs, within the scope of the authority given by law to supervisory officials, requires primarily a judgment as to the needs of public business. The determination of those needs plainly involves the exercise of discretion, not the performance of a ministerial duty which can be compelled by mandamus. * * *"

Clearly, appellant's separation was not arbitrary and capricious, but was fully supported by substantial evidence. Slavitt v. United States, supra; Saxon v. United States, supra; Umbeck v. United States, supra; Boylan v. Quarles, supra. Furthermore, appellees

are entitled to the presumption of validity which attends official action. Hammond v. Hull, 76 U. S. App. D. C. 301, 131 F. 2d 25 (1942), cert. den., 318 U. S. 777 (1943).

In urging upon the court below that the reduction in force which resulted in his separation from his position with the District of Columbia Government was wrongful, appellant submitted materials which were not a part of the administrative record; namely Exhibits A-1, A-5 through A-11, A-24, A-35, A-38 through A-40 and paragraphs numbered 2, 3, 5-11, 16-18 in his statement of facts (J. A. 27-30). On the ground that the above-enumerated exhibits and paragraphs were not a part of the administrative record, the court properly ordered them stricken (J. A. 82-83).

In United States v. Bianchi & Co., 373 U. S. 709, 715, 10 L. Ed. 2d 652, 83 S. Ct. 1409 (1963), the Supreme Court held that where a court reviews the action of an administrative body its review is limited to the administrative record, saying, at p. 715:

> "* * * The term 'substantial evidence' in particular has become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court. This standard goes to the reasonableness of what the agency did on the basis of the evidence before it, for a decision may be supported by substantial

> evidence even though it could be refuted by other evidence that was not presented to the decision-making body."

Patently, therefore, the court below correctly refused to consider evidence not presented to the reviewing administrative body.[2]

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[2] Appellant also contends that he was precluded from presenting all of the necessary and relevant evidence at the administrative hearings because "there is no right of discovery before the Commission and no power of subpoena over either persons or documents. 5 C. F. R. (1957 ed.) 22,607" and because "the material finally obtained via discovery was not otherwise available to appellant * * *" (Appellant's Brief, p. 17).

There are two answers to these contentions. First, appellant's reference above to "5 C. F. R. § 22,607" [sic] has no relevance to the case at bar because that section (properly 5 C. F. R § 22.607) applies only to "appearance of witnesses" at hearings for Veterans' Preference Eligibles, and appellant is not a veteran (Exhibit D-11). Secondly, he asked for, and was granted (upon representations made by his first retained counsel) the right to inspect the records "* * *having a bearing on Mr. Pence's reduction in force * * *" (Exhibit D-16). Appellant, therefore, contradicts the record when he alleges that "the material finally obtained via discovery was not otherwise available to appellant" (Appellant's Brief, p. 17; Exhibit D-16).

II

Appellant's separation from a position in the District of Columbia Department of Public Health was procedurally correct.

A. Because appellant was employed in the "excepted" service, he was not entitled to the benefits of the Lloyd-LaFollette Act.

Appellant contends that at the time of his separation from the position of "Position Classifier," District of Columbia Department of Public Health, he was employed in the "competitive" (sometimes called "classified") service, as distinguished from the "excepted" service.[3] Nonetheless, it appears hardly debatable that appellant was employed, not in the "competitive" service, but in the "excepted" service.

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[3] Employees in the "competitive" service enjoy certain advantages over those in the "excepted" service in that the former have superior job eligibility, retention, removal, and reinstatement rights. Additionally, those in the "competitive" service have the benefits afforded by the Lloyd-LaFollette Act, which provides for removal or suspension only for such cause as will promote the efficiency of the service and upon reasons "given in writing," and which further provides certain appeal rights. 5 U. S. C. § 652 (1958).

The Rules of the Civil Service Commission state explicitly that:

> "The competitive service shall include: * * * (b) all positions in * * * the Government of the District of Columbia which are specifically made subject to the civil-service laws by statute. * * *" [Emphasis supplied.] 5 C. F. R. § 01.2 (1961).[4]

Those positions of the District of Columbia Government which have been "specifically made subject to the civil service laws by statute" are in (1) the Juvenile Court, (2) the Department of Public Welfare, (3) the District of Columbia Unemployment Compensation Board, (4) the Office of the Recorder of Deeds, and (5) the Department of Corrections (Exhibit D-24). Employment in the Department of Public Health, therefore, could not confer "competitive" status upon appellant, and this fact was recognized below at every stage of the proceedings -- by the District of Columbia Commissioners (Exhibit D-7), by the Chief, Appeals Examining Office (Exhibit D-17), and

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[4] All citations to C. F. R. (Code of Federal Regulations) herein are those which were current at the time of appellant's removal or separation from District of Columbia employment.

the Board of Appeals and Review, United States Civil Service Commission (Exhibit D-20), and by the court below (J. A. 82).

Appellant contends that because he had "competitive" service as an officer and employee of the federal government, he carried this status with him as an officer and employee of the District of Columbia Government (Appellant's Brief, pp. 13-14). A short answer to this contention is that, as shown above, all positions in the District of Columbia Department of Public Health are "excepted" and not "competitive" positions. Moreover, this Court has said, so far as the applicability of Civil Service Regulations are concerned, that "officers and employees of the District of Columbia are not officers and employees of the general government of the United States * * *." Griffith v. Rudolph, 54 App. D. C. 350, 352, 298 Fed. 672 (1924). See and compare Harris v. Boreham, 233 F. 2d 110 (3rd Cir., 1956). Thus, it cannot be persuasively contented that appellant's "competitive" status was transferable notwithstanding the Civil Service Regulations.

Appellant cited and relies upon Roth v. Brownell, 94 U. S. App. D. C. 318, 215 F. 2d 500 (1954), cert. den., 348 U. S. 863 (1955), but that case is easily distinguishable because Roth had not

transferred his employment from one governmental entity to another and to an "excepted" position in the civil service.

Were District of Columbia employees in "excepted" positions permitted to obtain "competitive" status by virtue of a prior transfer from the federal government, the intention of Congress that all but a minority of District employees in selected departments should be bracketed in "excepted" service would be utterly frustrated. Appellant would have this Court import to congressional action "* * * the empty meaning of confetti throwing." Vitarelli v. Seaton, 359 U. S. 549 (1959). Inter-governmental transfers from the federal government to the District of Columbia Government would be greatly encouraged, and the various District departments would be staffed by a hodge-podge of both "competitive" and "excepted" employees.

Inasmuch as appellant was, at the time of his separation, an employee in the "excepted" service, he was clearly not entitled to the benefits of the Lloyd-LaFollette Act, for, as this Court said in Bailey v. Richardson, supra at p. 254, "The Act refers to persons 'in the classified [competitive] civil service'."

B. Because appellant was employed in the "excepted" service, he was entitled only to limited reassignment or "bumping" rights.

Appellant contends that he was improperly denied reassignment or "bumping" rights, yet, at every administrative level and in the court below, it was uniformly found that appellant was not improperly denied "bumping" rights (Exhibits D-7, D-17, D-20; J. A. 82). Reference to Civil Service Regulations confirms these findings.

As an employee in the "excepted" service, appellant was entitled to "bumping" rights within the Department of Public Health only "* * * if a competing employee with lower retention standing [was] * * * retained in the same competitive level." 5 C. F. R. § 20.5 (c) (1961). That is, he had the right to "bump" any employee with junior standing in the same competitive level, but inasmuch as there were no other employees in his same competitive level, there were none against whom he could exercise his "bumping" rights (Exhibits D-2, D-7, D-17, D-20; J. A. 82).

Had appellant been in the "competitive" service, he would have been entitled to "bumping" rights against fellow employees with junior standing in a lower competitive level, as well as against fellow employees in the same competitive level. 5 C. F. R. § 20.5 (b) (1961).

Clearly, therefore, appellant was not entitled, as an employee in the "excepted" service, to reassignment or "bumping" rights other than those limited rights which were actually accorded him.

C. Appellant was not entitled to a departmental appeal.

Appellant contends that he was entitled, as of right, to an administrative appeal within the Department of Public Health (Appellant's Brief, p. 11). The regulation which he cites as controlling provided, in 1958, as follows:

> "CHAPTER 15 - GRIEVANCES AND APPEALS
> Section A. Employee Grievances
>
> 1. SCOPE
>
> These procedures are established to assure an avenue of approach wherein an individual employee may seek adjustment of a personal complaint or grievance arising out of individual working conditions or job relations. Grievances or appeals resulting directly from reduction in force, demotion, position classification actions, policies, and administrative practices are covered elsewhere in Chapter 15." District of Columbia Personnel Manual. [Emphasis supplied.]

It is apparent from reading, in its entirety, Chapter 15 of the District of Columbia Personnel Manual that the above-quoted statement merely indicated a future intention by the executive officers of the District to provide machinery for appeals, inter alia, from reduction in force actions, and that the future intention was never actually implemented.[5] Although the provision read that " * * * appeals

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[5] This fact was made clear by Commissioners' Order No. 59-671, dated April 7, 1959, which indicates that the District abandoned its earlier formed intention to provide for appeals from reduction in force actions. The order provides:

"ORDERED:

That Subsection A-1 of Chapter 15, Grievances and Appeals, of the District Personnel Manual is changed to read as follows:

1. Scope.

These procedures are established to assure an avenue of approach wherein an individual employee may seek adjustment of a personal complaint or grievance arising out of individual working conditions or job relations. A grievance or an appeal resulting directly from a reduction-in-force or position classification action is not within the scope of this section. Likewise, a grievance or an appeal against an action placing an employee on furlough without pay for a period of 30 calendar days or less is excluded from coverage of this section, except when the selection of the employee is made on an individual rather than a group basis." [Emphasis supplied.]

resulting directly from reduction in force * * * are covered elsewhere in Chapter 15," ibid, they were not, in fact, "covered elsewhere." Therefore, the only rights of appeal to which appellant was entitled were rights afforded him under the Civil Service Regulations, which he exercised, i.e., to appeal first, to the Chief, Appeals Examining Office and, finally, to the Board of Appeals and Review, both subordinate bodies of the United States Civil Service Commission.

5 C. F. R. § 20.9 (1961).

Appellant's claim of error in this regard is not that he was denied a right of review, but that he was denied the type of review which he would like to have, i.e., a departmental review. This Court has said many times that government employment is not a "property right." Bailey v. Richardson, supra, and that "unless limited by constitution or statute 'the power of appointment to public office carries with it the right of removal'." Levy v. Woods, supra at p. 385.

The review procedures established by the Civil Service Commission, and followed in the case at bar, have been approved in countless cases in this and other courts; thus, appellant was, beyond contradiction, accorded the administrative due process to which he was entitled. Cf. Studemeyer v. Macy, 116 U. S. App. D. C. 120, 321 F. 2d 386 (1963).

REPLY BRIEF FOR APPELLANT

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19136

ANDREW R. PENCE,
*Appellant,*

v.

WALTER N. TOBRINER, et al.
*Appellees.*

*Appeal From the United States District Court*
*for the District of Columbia*



JOHN I. HEISE, JR.
919 - 18th Street, N. W.
Washington, D. C.
*Attorney for Appellant*

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## REPLY BRIEF

### I.

### THERE IS NO REBUTTAL TO APPELLANT'S CONTENTION OF ENTITLEMENT TO GRIEVANCE APPEAL

In an effort to rebut appellant's entitlement to an appeal to the District of Columbia, appellees Tobriner, *etal.*, rely upon the 1959 Commission Order which excludes reduction in force from the scope of a grievance appeal. Obviously, such an Order, promulgated in April 1959, would be in no wise controlling over a 1958 separation which took place over one year before the Order was promulgated.

The thrust of appellees' argument is that an attempt may be made at separation, under the guise of a position abolishment or reduction in force, and by reason of the separation being styled in this manner, the wronged employee is entitled to no administrative review even though the action itself is not a reduction in force. We do not feel that the Congress, in establishing the Civil Service Commission, and authorizing it to promulgate regulations to administer certain personnel actions, ever intended that such a hopeless situation would confront an aggrieved employee. If appellees are correct in their position, then any employee can be improperly removed by simply terming the action a reduction in force. Our courts can never let this happen. *T. Michael Smith v. United States*, 151 C. Cls. 205.

In their brief, appellees (pp. 9-10) Macy, et al, rely quite heavily upon the fact that plaintiff had an interview with Commissioner Karrick and seem to argue that such an interview would suffice and substitute for the grievance appeal which is contemplated by the District of Columbia regulations. This is not so. The right to personal interview and the right to appeal (coupled with appropriate pleadings, representations, witnesses, evidence, etc.) are two distinctly separate proceedings. A personal interview is wholly analogous to the right to personal appeal accorded under the Veterans Preference Act, whereas, the grievance appeal is clearly comparable to the hearing and appeal accorded under the same Act. The cases of *Washington v. United States*, 137 C.Cls. 344; and *Hart v. United States*, 148 C.Cls. 10; properly recognize the difference between the two types of proceedings.

Moreover, the reports of Commissioner Karrick to Congressman McMillan (Special J.A. D-7) and Commissioner McLaughlin to Senator Morse (Special J.A. D-12) are replete with errors. These errors were detailed in appellant's letters to Congressman McMillan of March 19, 1958 (Special J.A. D-10), and to Senator Morse of April 4, 1958 (Special J.A. D-14), which letters and errors were also speci-

fically directed to the attention of the Civil Service Commission in plaintiff's appeal (Special J.A. D-19, p.4, and exhibits attached to brief). This record demonstrates beyond any doubt that appellant was performing the services of *both* journeyman classifier and supervisor; that the announced purpose for appellant's position was incorrect; and that the reasoning behind the abolition of appellant's position was clearly erroneous. The many errors in the reports which are itemized in the exhibits appearing at Special J.A. D-10 and D-14, establish the wholly erroneous understanding of Commissioners Karrick and McLaughlin about the entire reduction.

## II.

## APPELLANT'S CONTINUATION IN THE CLASSIFIED SERVICE

Appellees Macy, *et al.*, contend that the case of *Roth v. Brownell*, 94 U.S. App. D.C. 318, 215 F2d 500, cert. den. 348 U.S. 863, is distinguishable because appellant cannot remain in classified status surrounded by a sea of excepted employees. In other words, appellees argue that every employee in the Department must be in virtually the same status. Such is not so.

Just as one Veteran Preference status employee can be located in a Department of all non-veterans, and thereby receive preferential treatment, so also an "excepted" position can, under certain circumstances, be filled by transfer of a person having competitive service, with such person considered as retaining his classified status, and the position will remain in the classified service during the employee's incumbency. See: *Federal Personnel Manual*, Chap. 302-3 (1-1a).

There is ample justification for continuation of appellant in classified status, especially where there has been no proper procedural

removal from such status. The guarantees precluding arbitrary stripping of status apply to the District of Columbia, as well as other agencies. 5 C.F.R. 20.1; 21.1. When appellees failed to follow such procedures, appellant retained his competitive status and all the rights stemming therefrom.

## III.

## THE REVIEW BY THE COMMISSION

Appellees contend that since the Civil Service Commission has ruled adversely to appellant he is virtually estopped from contesting his dismissal in Court. Even though appellant detailed the facts establishing the procedural and classification errors of his reduction in his briefs to the Commission (Special J.A. D-9, D-19), and requested a hearing on his separation, this hearing request was denied (Special J.A. D-11), and as we pointed out in our main brief (p. 12), the District's procedural irregularities were never even passed upon. Thus, no presumption attaches to the administrative review when the Commission *has refused* to even question the District's decision to abolish appellant's position (Special J.A. D-20) and has also refused to consider the question of the District's adherence to its own regulations (Special J.A. D-21).

These issues having been raised before the Commission, as well as before District Officials, and having been passed over administratively by all appellees without decision, are now properly before the Court without administrative determination because appellees tried to dodge the issue and simply refused to pass upon the matter.

Certainly, the case of *United States v. Bianchi & Co.*, 373 U.S. 709, 715, 10 L. Ed. 2d 652, 83 S. Ct. 1409 (1963), which is concerned with the specialized review of a standard government contract, is non-controlling in this instance where there has been no review at

all, despite the fact that very same questions were raised adminstratively as are before the Court. The Commission's investigation, if it had taken place, would have unearthed the very documents secured via discovery below. The issues which demanded such investigation were presented, and the evidence attacking the propriety of the reduction was submitted. When the Commission elected not to investigate, appellant could only seek relief in the courts and use the processes then available to obtain that support which the Commission chose to ignore. This is, we submit, wholly in order. Appellant should not be limited because the Commission refused to do its job and because the District Officials were arbitrary. *T. Michael Smith v. United States*, 151 C.Cls. 205.

## CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

JOHN I. HEISE, JR.
*Attorney for Appellant*

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,136



ANDREW R. PENCE,
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v.

WALTER N. TOBRINER, et al.,
*Appellees*

## PETITION FOR REHEARING

Appellant hereby petitions this Honorable Court under Rule 26 of this Court for a Rehearing in this cause from the Opinion of July 15, 1965.

Rehearing is sought upon the basis of the following points:

### POINT I

**The Court's Opinion Mis-states Appellant's Principal Claim and Ignores the Crux of His Argument**

This Court's Opinion states that "the principal claim here is that the reorganization was not bona fide, * * *." This just is not so.

A. Appellant's main point, set forth as Roman One in his main brief, is that, "Appellees in Denying Appellant a Grievance Appeal Failed to Comply with Their Own Regulations." This main and primary point is

then elaborated upon to show that by the very language of the District Personnel Manual appellant was entitled to a grievance appeal. This he was denied as the record so clearly establishes. Chapter 15 of the District Manual, in a statement of guarantee, held out to appellant, and the public in general, that there was such a right of appeal available. Its denial was and is a basic procedural error.

As point 1 (main brief, p. 5) and as point 2 (main brief, p. 6), appellant listed this procedural omission in his "Statement of Points." And in his summary of argument appellant spelled out this denial as his first and main contention.

Even in his reply brief (pps. 1-3), appellant continued to meet and rebut any arguments attempted against this, his main point of "Entitlement to Grievance Appeal."

B. Appellant's second point and secondary contention, presented as Roman Two in the main brief, was that he was improperly removed to the Excepted Service. Reliance here was placed upon the case of *Roth v. Brownell*, 94 App. D.C. 318, 215 F.2d 500, cert. den., 348 U.S. 863, and other cases cited in the brief to establish a second procedural error.

This was also point 3 in appellant's "Statement of Points." And in his reply brief, appellant rebutted all arguments advanced against his improper removal from the classified service under Section II thereof.

C. The allegation that the reduction was not bona fide was relegated to the third position of importance in appellant's main brief and to a similar position in both his Statement of Points and Summary of Argument.

D. The oral argument centered almost entirely about appellant's two main allegations of procedural omission. A replay of the recording of this argument will refresh the Panel's recollection in this regard. The key to the case rested with the procedural errors in the separation process. The Panel's inquiries during oral argument were directed

almost entirely in this direction, because this was the very crux of the appeal.

E. Appellant's principal claim has been misunderstood and misstated in the opinion entered herein.

## POINT II

### The Court's Opinion Ignores the Procedural Issues Present

The procedural omissions were not even discussed in the opinion. The rule is firmly established that a failure to accord an employee the proper procedural steps, negates the entire removal process. *Service v. Dulles*, 354 U.S. 363; *Vitarelli v. Seaton*, 359 U.S. 535; *Watson v. United States*, 355 U.S. 14. The procedural irregularities here are the very essence of the case.

In failing to consider and decide the procedural issues presented, this Court side-stepped its responsibility to this appellant. The record here demanded that these procedural contentions, which were so forcefully argued and briefed on both sides, be discussed and ruled upon by this Court. This omission clearly requires a rehearing.

This Court cannot, even though it attempts to reconcile the merits of the action taken under "suspicious circumstances" in favor of appellees, overcome the fundamental principle that the failure to accord appellant proper procedural guarantees constitutes reversible error.

For the foregoing reasons, appellant respectfully prays that the petition for rehearing be granted.

Respectfully submitted,

JOHN I. HEISE, Jr.
919 - 18th Street, N.W.
Washington, D.C.

*Attorney for Appellant*

## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay.

JOHN L. HEISE, JR.
Attorney

## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing petition on counsel for appellees by placing said copy in the United States mail addressed to Hubert Pair, Esq., Assistant Corporation Counsel, D.C. Building, 14th nr Pennsylvania Ave., N.W., Washington, D.C., this 30th day of July, 1965.

JOHN L. HEISE, JR.
Attorney

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respectfully submitted,

JOHN I. HEISE, Jr.
919 - 18th Street, N.W.
Washington, D.C.

*Attorney for Appellant*

## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay.

JOHN L. HEISE, JR.
Attorney

## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing petition on counsel for appellees by placing said copy in the United States mail addressed to Hubert Pair, Esq., Assistant Corporation Counsel, D.C. Building, 14th nr Pennsylvania Ave., N.W., Washington, D.C., this 30th day of July, 1965.

JOHN L. HEISE, JR.
Attorney

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

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No. 19,136

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ANDREW R. PENCE,

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Appellees.

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## OPPOSITION TO PETITION FOR REHEARING

The two points relied upon by appellant in support of his petition for rehearing were extensively briefed, strenuously urged during oral argument, and correctly disposed of by this Court in its opinion rendered in the above-entitled cause July 15, 1965.

No point or matter is now urged by appellant as ground for rehearing which was not submitted to this Court either in the original briefing or oral argument of this case.

There has been no intervening decision by this Court or by the Supreme Court of the United States which is inconsistent or in conflict with the Court's decision of July 15, 1965.

For the foregoing reasons and others implicit in the Court's decision of July 15, 1965, it is respectfully submitted that the petition for rehearing should be denied.

/s/ Chester H. Gray
CHESTER H. GRAY,
Corporation Counsel, D. C.

/s/ Milton D. Korman
MILTON D. KORMAN,
Principal Assistant Corporation
Counsel, D. C.

/s/ Hubert B. Pair
HUBERT B. PAIR,
Assistant Corporation
Counsel, D. C.

/s/ Ted D. Kuemmerling
TED D. KUEMMERLING,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellees
Commissioners of the
District of Columbia,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition was mailed, postage prepaid, this 6th day of August, 1965, to John I. Heise, Jr., Esq., 919 Eighteenth Street, Northwest, Washington, D. C., Attorney for Appellant.

/s/ Ted D. Kuemmerling
TED D. KUEMMERLING,
Assistant Corporation
Counsel, D. C.